Tay Choo Foo @ Tay Chiew Foo v Tengku Mohd Saad @ Tengku Arifaad bin Tengku Mansur & Ors (all acting as administrators of the estate of Tunku Mansur bin Tunku Yaacob, deceased) and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02–1022 OF 2005 AND W-02–1023 OF 2005
MOHD GHAZALI, JAMES FOONG AND HELILIAH JJCA
18 AUGUST 2008

Companies and Corporations — Shares — Ownership of shares — Transfer of shares to first defendant — Whether first defendant had beneficial ownership of shares in company — Whether defendant as legal owner of shares held shares on trust for deceased and deceased's estate

Evidence — Hearsay — Oral hearsay — Admissibility of oral statement by deceased — Whether statement made in 'ordinary course of business' and thus within exception of s 32(1)(b) of the Evidence Act 1950

Trusts and Trustees — Trustees — Constructive trustee — Existence of construtive trust — Whether defendants held shares as constructive trustees — Whether legal owner of shares held shares on trust for deceased and deceased's estate — Whether trust needed to be in writing

The plaintiffs/respondents ('plaintiffs') were the children as well as the administrators of the estate of Tunku Mansur bin Tunku Yaacob, deceased ('the deceased'). The deceased had worked for Harrisons & Crosfield (M) Sdn Bhd and Harrisons & Crosfield (Sabah) Sdn Bhd ('the H&C subsidiaries') for about 20 years and was the chairman of both companies since 1978. Sometime in 1990 there was a proposal that the deceased effect a management buy-out of the H&C subsidiaries with a view to the eventual floatation of these companies on the Kuala Lumpur Stock Exchange ('KLSE'). As the deceased was in need of financial assistance to carry out the management buy-out, the first defendant, a friend of the deceased, proposed the participation of a group of Indonesian businessmen known as the Bumi Raya Utama Group ('BRUG'). The acquisition of the H&C subsidiaries was to be undertaken by BRUG via Jantoco Trading Sdn Bhd ('Jantoco'), a private limited company incorporated on 9 March 1990 for this purpose. After the acquisition, Jantoco was to proceed with the floatation of its shares

on the KLSE. On 26 September 1990 Jantoco issued to the deceased 2.6 million fully paid-up shares in Jantoco and subsequently on 28 January 1991 another 1.2 million fully paid–up shares in Jantoco. On 3 September 1991 Jantoco changed its name to Harrisons Holdings (M) Sdn Bhd and later on 28 April 1992 changed its status from that of a private limited company to a public limited company and became known as Harrisons Holdings (M) Bhd ('HHMB'), the second defendant in the plaintiffs' suit against the first defendant. Meanwhile the deceased agreed to sell 1.2 million shares in HHMB ('the shares') to the first defendant at its nominal value of RM1.2 million and executed a transfer of shares in favour of the first defendant. On 27 January 1992, the deceased signed a share transfer form, Form 32A naming the first defendant as the transferee of the shares. On 27 October 1993, the deceased passed away without completing the proposed floatation exercise of HHMB. It was the plaintiffs' claim that until the full purchase price of RM1.2 million, the nominal value of the shares, was paid by the first defendant, the beneficial ownership in the shares was to remain and vest in the deceased. Therefore the plaintiffs' action was instituted against the first defendant for the return of the shares which were earlier registered in the name of the deceased and subsequently transferred to the first defendant. The plaintiffs averred that the first defendant was obliged to pay the purchase price for the shares but that he had until to date failed or refused to make such payment to the deceased or the plaintiffs. Alternatively the plaintiffs averred that the transfer of the shares to the first defendant was made without any consideration and as such it was unlawful and unconscionable for the first defendant to retain ownership of the shares. Whilst the suit was pending hearing, HHMB carried out a bonus issue and as a consequence of this, additional shares were issued to the first defendant as the registered holder of the shares thereby increasing the first defendant's shareholding from 1.2 million shares to a total of 4,580,600 shares. Subsequently, on 28 April 2000 the first defendant transferred 4 million shares to his wife, the third defendant who in turn transferred 1 million shares to the fourth defendant (her daughter), and later another 1 million shares to the fifth defendant (another daughter). It was the first defendant's contention that there was an agreement between the deceased and himself that any shares personally allotted to or personally acquired by the deceased were to be divided equally between the deceased and him as consideration for the arranging of the participation of BRUG in the transaction and therefore denied that the deceased had agreed to sell the shares to him at the nominal price of RM1.2m. The first defendant further contended that his entitlement to the shares was due to his agreement with the deceased to pay for any acquisition price in excess of RM55m and which agreement was only produced for the first time at the trial. The third, fourth and fifth defendants contended that the first defendant had transferred the shares to them as a gift and that the plaintiffs had not objected to the said transfer. The trial judge who heard this suit allowed the plaintiffs' claim and ordered that the shares, which then totaled 4,580,600, and all monies and

dividends arising from the shares be returned by the defendants to the plaintiffs. These two appeals by the first defendant against the plaintiffs and by the third, fourth and fifth defendants against the plaintiffs arose from this suit.

Held, dismissing both appeals with costs:

(1) The trial judge did not err when he accepted the evidence of Gabriel Patrick O'Holohan ('Gabriel'), the deceased's trusted friend and confidante who was also the deceased's attorney under the power of attorney and was empowered to look after the deceased's personal and business affairs when he was away. This power of attorney would support the finding of the trial judge that the deceased consulted and kept Gabriel informed on practically every aspect of his business dealings and personal affairs and had informed and discussed with him matters relating to the management buy-out. In addition, the management buy-out and the transfer of the shares would concern Gabriel in his capacity as attorney and in his business with the deceased. Therefore, the trial judge was not wrong when he ruled that the oral statement made by the deceased to this witness relating to the management buy-out and the transfer of the shares to the first defendant were admissible being statements made in the 'ordinary course of business' and thus within the exception of s 32(1)(b) of the Evidence Act 1950 ('the Act'). Furthermore, the trial judge was also right in giving the words 'in the ordinary course of business' in s 32(1)(b) of the Act a broad and liberal connotation (see paras 82–85).

(2) The trial judge found the witness Gabriel to be a credible and reliable witness who did not have a pecuniary interest in the outcome of the present suit and there was no reason to set aside this finding. Moreover, there was corroboration of the witness's evidence based upon the facts and circumstances of the instant appeal (see paras 86–87).

(3) The trial judge had clearly indicated that he preferred the evidence of Gabriel over the evidence of the first defendant because he found the latter to be evasive and as giving contradictory evidence. In addition the first defendant's claim that the shares were given to him for free and that it was his share for having arranged the participation of BRUG in the management buy-out was not supported or borne out by contemporaneous documents and the objective facts of the case (see paras 89–90).

(4) The trial judge was correct in holding that the first defendant was a constructive trustee of the shares. As the trial judge had rightly observed, the essential ingredients to sustain an action against the first,

third, fourth and fifth defendants as constructive trustees for the shares that were transferred to them had been sufficiently pleaded (see para 91).

(5) In the instant appeals there would be unjust enrichment if the defendants were allowed to keep the shares. Thus the trial judge was right in imputing a constructive trust whereby the first defendant held the shares on trust for the deceased's estate. Having regard to the first defendant's conduct in not being able to prove that the shares were given gratuitously to him by the deceased and his conduct in transferring the shares to the third defendant, it would be inequitable to allow him to deny the deceased's estate of the shares. From the circumstances the trial judge was right in finding that there had been an arrangement between the first defendant and the deceased to hold the shares on trust for the deceased. This arrangement and the first defendant's conduct was not merely an unenforceable declaration of trust but an arrangement which the law could give effect. As the legal owner of the shares the first defendant was bound to hold the property on trust for the deceased and this trust did not need to be in writing (see paras 95–96).

(6) The first defendant had placed himself in a special fiduciary position when he conceded during the course of this appeal that he never paid for the shares. The transaction between the deceased and the first defendant involved nothing more than a transfer of the shares to the first defendant and the fact that the beneficial interest in the shares never left the deceased but remained where it had previously been showed that it was a constructive trust. The first defendant was registered as the owner of the shares but pending the payment of the RM1.2m it was held on oral trust for the deceased. Therefore the deceased and now his estate was beneficially entitled to the shares and would at any time call for the transfer of the shares and be registered once again as its owner (see paras 97–98).

[Bahasa Malaysia summary

Plaintif/responden ('plaintif') adalah anak-anak dan juga pentadbir-pentadbir harta pusaka Tunku Mansur bin Tun Yaacob, si mati ('si mati'). Si mati telah bekerja untuk Harrisons & Crosfield (M) Sdn Bhd dan Harrisons & Crosfield (Sabah) Sdn Bhd ('syarikat subsidiari H&C') selama lebih kurang 20 tahun dan merupakan pengerusi kedua-dua syarikat sejak 1978. Sekitar 1990 terdapat cadangan agar si mati melaksanakan pengurusan jual balik syarikat subsidiari H&C dengan pandangan terhadap pengapungan syarikat-syarikat tersebut di Bursa Saham Kuala Lumpur ('BSKL'). Memandangkan si mati memerlukan bantuan kewangan bagi melaksanakan

pengurusan jual balik itu defendan pertama, seorang rakan si mati, mencadangkan penglibatan sekumpulan ahli perniagaan Indonesia dikenali sebagai Bumi Raya Utama Group ('BRUG'). Pemerolehan syarikat subsidiari H&C sepatutnya dijalankan oleh BRUG melalui Jantoco Trading Sdn Bhd ('Jantoco'), sebuah syarikat sendirian berhad pada 9 Mac 1990 bagi tujuan ini. Selepas pemerolehan itu, Jantoco sepatutnya meneruskan pengapungan sahamnya di BSKL. Pada 26 September 1990 Jantoco telah mengeluarkan 2.6 juta saham berbayar penuh Jantoco kepada si mati dan kemudian pada 28 Januari 1991 1.2 juta lagi saham berbayar penuh Jantoco. Pada 3 September 1991 Jantoco telah bertukar nama kepada Harrisons Holdings (M) Sdn Bhd dan kemudian pada 28 April 1992 bertukar statusnya kepada syarikat sendirian berhad kepada syarikat berhad dan dikenali sebagai Harrisons Holdings (M) Bhd ('HHMB'), defendan kedua dalam guaman plaintif terhadap defendan pertama. Sementara itu si mati bersetuju menjual 1.2 juta saham dalam HHMB ('saham tersebut') kepada defendan pertama pada harga nominal RM1.2 juta dan menyempurnakan pindahan saham kepada defendan pertama. Pada 27 Januari 1992, si mati menandatangani borang pindahan saham, Borang 32A menamakan defendan pertama sebagai penerima pindahan saham tersebut. Pada 27 Oktober 1993, si mati telah meninggal dunia tanpa menyelesaikan urusan pengapungan HHMB yang dicadangkan. Adalah tuntutan plaintif bahawa sehingga harga belian penuh RM1.2 juta, nilai nominal saham tersebut, dibayar oleh defendan pertama, milikan benefisiari dalam saham tersebut kekal dan terletak hak kepada si mati. Oleh itu tindakan plaintif dimulakan terhadap defendan pertama bagi mendapat balik saham tersebut yang pada mulanya didaftarkan dalam nama si mati dan kemudiannya dipindahkan kepada defendan pertama. Plaintif menegaskan bahawa defendan pertama wajib membayar harga belian saham tersebut tetapi sehingga kini gagal atau enggan membuat bayaran sedemikian kepada si mati atau plaintif. Secara alternatif plaintif menegaskan bahawa pindahan saham tersebut kepada defendan pertama dibuat tanpa apa-apa balasan dan oleh itu ia menyalahi undang-undang dan tidak berpatutan untuk defendan pertama mengekalkan milikan saham tersebut. Sementara guaman itu menunggu pendengaran, HHMB menjalankan pengeluaran bonus dan akibatnya, saham tambahan dikeluarkan kepada defendan pertama sebagai pemegang berdaftar saham tersebut yang menambahkan pegangan saham defendan pertama daripada 1.2 juta saham kepada sejumlah 4,580,600 saham. Berikutan itu, pada 28 April 2000 defendan pertama telah memindahkan 4 juta saham kepada isterinya, defendan ketiga yang telah memindahkan 1 juta saham kepada defendan keempat (anak perempuannya), dan kemudian 1 juta saham lagi kepada defendan kelima (seorang lagi anak perempuan). Defendan pertama berhujah bahawa perjanjian antara si mati dengan dirinya adalah apa-apa saham yang diberikan secara peribadi kepada atau diperoleh secara peribadi oleh si mati hendaklah dibahagikan sama rata antara si mati dengan dia sebagai balasan menguruskan penglibatan BRUG dalam transaksi dan oleh itu menafikan

bahawa si mati telah bersetuju menjual saham tersebut kepadanya pada harga nominal RM1.2j. Defendan pertama selanjutnya menegaskan bahawa haknya terhadap saham tersebut disebabkan perjanjiannya dengan si mati untuk membayar apa-apa harga pemerolehan melebihi RM55j dan perjanjian itu hanya dikemukakan buat kali pertama semasa perbicaraan. Defendan-defendan ketiga, keempat dan kelima berhujah bahawa defendan pertama telah memindahkan saham tersebut kepada mereka sebagai hadiah dan plaintif tidak membantah pindahan tersebut. Hakim perbicaraan yang mendengar guaman ini telah membenarkan tuntutan plaintif dan memerintahkan agar saham tersebut dikembalikan oleh defendan kepada plaintif. Kedua-dua rayuan tersebut oleh defendan pertama terhadap plaintif dan oleh defendan ketiga, keempat dan kelima terhadap plaintif timbul daripada guaman ini.

Diputuskan, menolak kedua-dua rayuan dengan kos:

(1) Hakim perbicaraan tidak terkhilaf bila beliau menerima keterangan Gabriel Patrick O'Holohan ('Gabriel'), rakan si mati yang dipercayai dan tempat mengadu yang juga peguam si mati di bawah surat kuasa wakil dan diberi kuasa menjaga urusan peribadi dan perniagaan si mati semasa ketiadaannya. Surat kuasa wakil ini menyokong penemuan hakim perbicaraan bahawa si mati telah berunding dan memaklumkan Gabriel tentang hampir semua aspek urusan perniagaan dan peribadinya dan telah memberitahu dan berbincang dengannya perkara berkaitan pengurusan jual balik itu. Tambahan, pengurusan jual balik dan pindahan saham tersebut melibatkan Gabriel dalam kapasitinya sebagai peguam dan dalam perniagaannya dengan si mati. Oleh itu hakim perbicaraan tidak terkhilaf apabila beliau memutuskan bahawa kenyataan lisan yang dibuat oleh si mati kepada saksi ini berkaitan pengurusan belian dan pindahan saham tersebut kepada defendan pertama diterima sebagai kenyataan yang dibuat dalam 'ordinary course of business' dan oleh itu dalam lingkungan pengecualian s 32(1)(b) Akta Keterangan 1950 ('Akta'). Bahkan, hakim perbicaraan juga betul dalam memberikan pentafsiran luas dan liberal terhadap perkataan-perkataan 'in the ordinary course of business' dalam s 32(1)(b) Akta (lihat perenggan 82-85).

(2) Hakim perbicaraan mendapati saksi Gabriel sebagai saksi yang boleh dipercayai dan diharap tanpa kepentingan kewangan dalam keputusan guaman ini dan tiada sebab untuk mengetepikan penemuan ini. Malah, keterangan saksi disokong berdasarkan fakta dan keadaan rayuan ini (lihat perenggan 86–87).

(3) Hakim perbicaraan jelas membayangkan beliau lebih menyebelahi keterangan Gabriel daripada keterangan defendan pertama kerana

mendapati keterangan defendan pertama seperti cuba mengelak dan memberikan keterangan bercanggah. Tambahan tuntutan defendan pertama bahawa saham tersebut diberikan kepadanya percuma dan ianya sahamnya kerana menguruskan penglibatan BRUG dalam pengurusan jual balik tidak disokong oleh dokumen sedia ada dan objektif fakta kes (lihat perenggan 89–90).

(4) Hakim perbicaraan betul dalam memutuskan bahawa defendan pertama merupakan pemegang amanah konstruktif saham tersebut. Memandangkan hakim perbicaraan telah meneliti sewajarnya, faktor penting untuk mengekalkan tindakan terhadap defendan pertama, ketiga, keempat dan kelima sebagai pemegang amanah konstruktif untuk saham tersebut yang telah dipindahkan kepada mereka telahpun dirayukan sewajarnya (lihat perenggan 91).

(5) Dalam rayuan-rayuan ini pengayaan tidak adil akan berlaku jika defendan dibenarkan menyimpan saham tersebut. Oleh itu hakim perbicaraan betul mengatakan amanah konstruktif yang mana defendan pertama memegang saham tersebut atas amanah bagi harta pusaka si mati. Berdasarkan perlakuan defendan pertama yang tidak dapat membuktikan saham tersebut tidak sepatutnya diberikan kepadanya oleh si mati dan perlakuannya memindahkan saham tersebut kepada defendan ketiga, ia adalah tidak adil untuk membenarkannya menafikan saham tersebut dalam harta pusaka si mati. Urusan ini dan perlakuan defendan pertama bukan sahaja deklarasi amanah yang tidak boleh dikuatkuasakan tetapi urusan yang mana undang-undang boleh memberikan penguatkuasaan. Sebagai pemilik sah saham tersebut defendan pertama terikat untuk memegang harta tersebut atas amanah bagi si mati dan amanah ini tidak perlu secara bertulis (lihat perenggan 95–96).

(6) Defendan pertama telah meletakkan dirinya dalam kedudukan fidusiari khas apabila dia mengaku semasa rayuan ini dijalankan dia tidak pernah membayar untuk saham tersebut. Transaksi antara si mati dengan defendan pertama tidak lebih daripada pindahan saham kepada defendan pertama dan hakikat bahawa kepentingan benefisial dalam saham tersebut tidak diambil daripada si mati tetapi kekal seperti sebelumnya menunjukkan bahawa ia adalah amanah konstruktif. Defendan pertama merupakan pemilik saham tersebut tetapi sementara menunggu bayaran RM1.2j ia dipegang atas amanah lisan bagi pihak si mati. Oleh itu si mati dan kini harta pusakanya berhak secara benefisial kepada saham tersebut dan akan pada bila-bila masa memanggil untuk pindahan saham tersebut dan didaftarkan sekali lagi sebagai pemiliknya (lihat perenggan 97–98).]

Notes

For a case on oral hearsay, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) para 1632.

For cases on constructive trustee, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2530-2531.

For cases on ownership of shares, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 860-865.

Cases referred to

Chua Chee Chor v Chua Kim Yong & Ors [1960] MLJ 127, CA (folld)
Devi Singh v Mt Phulma AIR 1961 HP 10 (refd)
Hussey v Palmer [1972] 3 All ER 744, CA (refd)
Khoo Kay Hock v EJ Ketting & Ors [1978] 2 MLJ 57, HC (refd)
Kwa Hock Kee & Anor v Kwa Kian Seng [1985] 2 MLJ 283, HC (refd)
Ladd v Marshall [1954] 3 All ER 745, CA (refd)
Ramamurthi v Subba Rao AIR 1937 Mad 19 (refd)
Vandervell's Trusts (No 2), White and Ors v Vandervell Trustees Ltd, Re [1974] Ch 269, CA (folld)
Samar binte Mansor v Mustafa Kamal Ariffin [1974] 2 MLJ 71, FC (refd)
Tay Kheng Hong v Heap Moh Steamship Co Ltd [1964] 30 MLJ 87, HC (refd)
Westdeutsche Landesbank Girozentrale v Islington London Borough Council [1996] AC 669, HL (refd)

Legislation referred to

Courts of Judicature Act 1964 s 69(1), 69(2), 69(3)
Evidence Act 1950 s 32(1)(b)
Evidence Act [India] s 32(1)(b), 32(2)
Evidence Ordinance s 41(2)(d)
Penal Code s 193
Rules of the Court of Appeal 1994 r 7, r 7(2), r 7(3A)

Appeal from: Suit No D3–22–4404 of 1998 (High Court, Kuala Lumpur)

Raja Aziz Addruse (Joseph Yeo with him) (Joseph Yeo) for the first appellant.
Wong Kim Kheng (Andrew Chew and Loh Chu Bian with him) (Lee Hishamuddin Allen & Gledhill) for the third, fourth and fifth appellants.
Jagjit Singh (Teo Cheng Wee and Tan Yee Boon with him) (Khaw & Partners) for the respondents.

Mohd Ghazali JCA (delivering judgment of the court):

[1] These two appeals, namely, Civil Appeal No W-02-1022 of 2005 and Civil Appeal No W-02–1023 of 2005 (hereafter referred to as the first and

second appeals respectively) arose out of the same suit, ie, High Court Kuala Lumpur Civil Suit No D3–22–4404 of 1998 and were heard together at the request of all parties.

[2] The plaintiffs in the court below (the respondents in both appeals) are the children and also the administrators of the estate of Tunku Mansur bin Tunku Yaacob, deceased (hereafter referred to as 'the deceased'). Tay Choo Foo @ Tay Chiew Foo, the first defendant in the court below (the appellant in the first appeal) and the third defendant in the court below (the first appellant in the second appeal) are husband and wife respectively and the fourth and fifth defendants in the court below (the second and third appellants in the second appeal) are their daughters.

[3] The second defendant, ie, Harrisons Holding (M) Bhd (hereafter referred to as 'HHMB') is a locally incorporated public company and was listed on the local bourse on 25 October 1999. HHMB is not a party to these appeals. HHMB was formerly known as Jantoco Trading Sdn Bhd, viz, a private limited company (hereafter referred to as 'Jantoco' whenever applicable). It changed its name to Harrisons Holdings (M) Sdn Bhd and later to Harrisons Holdings (M) Bhd, viz, HHMB when it became a public limited company. Except for HHMB, we will refer to the parties as they were in the court below.

[4] The plaintiffs' action was originally instituted against the first defendant for the return of 1.2m HHMB shares (hereafter referred to as 'the said shares') which were earlier registered in the name of the deceased and subsequently transferred to the first defendant.

[5] HHMB is presently the 100% registered proprietor of the following companies:

(i) Harrisons & Crosfield (M) Sdn Bhd (now known as Harrisons Trading (Peninsular) Sdn Bhd);

(ii) Harrisons & Crosfield (Sabah) Sdn Bhd (now known as Harrisons Trading (Sabah) Sdn Bhd);

(hereafter collectively referred to as 'the H&C subsidiaries').

[6] It would be appropriate to mention here that on the day the suit was filed, ie, 27 November 1998 the plaintiffs simultaneously filed an application (encl (3)) for, inter alia, an interlocutory order that the first defendant be restrained from selling, transferring, assigning, charging or howsoever dealing with the said shares until the trial of this action or until further order. When

the application came up for hearing, the first defendant offered an undertaking on the following terms which was recorded by the court (encl (17)) and it read as follows:

> UPON the consent of the plaintiffs to withdraw the Summons in Chambers dated 27th November 1998 with no order as to costs, AND without any admission to liability by the first defendant and without prejudice to any defence of the first defendant in this action, the first defendant hereby undertakes not to dispose off any of the shares which are the subject matter of this action until the date of the trial herein AND will not take the dividend declared under warrant No 98/5 at the same time AND FURTHER that the first defendant agrees that the dividend be deposited in an interest bearing fixed deposit account until the date of the trial of this action.

[7] Whilst the suit was pending hearing, HHMB carried out a bonus issue as a consequence of which an additional HHMB shares were issued to the first defendant by virtue of him being the registered holder of the said shares. The bonus issue resulted in the first defendant's shareholding to increase from 1.2m shares to a total of 4,580,600 shares.

[8] Subsequently, on or about 28 April 2000 the first defendant transferred 4m shares to the third defendant, ie, his wife. On or about 11 December 2000, the third defendant transferred 1m shares to the fourth defendant. About two weeks later, on or about 26 December 2000 the third defendant further transferred another 1m shares to the fifth defendant. Thus, as a result of the share transfers between the first, third, fourth and fifth defendants, the registered ownership of the said shares (now amounting to 4,580,600 shares) whilst trial was pending was as follows:

The first defendant —	580,600
The third defendant —	2,000,000
The fourth defendant —	1,000,000
The fifth defendant —	1,000,000
Total	4,580,600

[9] As a result of this development, the plaintiffs made an application to name the first defendant's wife (ie the third defendant) and their daughters (ie, the fourth and fifth defendants) as defendants to the action. It was allowed by the court and the pleadings were accordingly amended.

[10] At the trial, eight witnesses gave evidence for the plaintiffs and a total of five witnesses gave evidence for the defence. At the end of the day, the learned judge of the High Court allowed the plaintiffs' claim in respect of all prayers requested for and ordered that the said shares which then totalled

A 4,580,600 shares together with all monies and dividends arising from the shares to be returned by the defendants to the plaintiffs. Hence, this appeal.

THE PRELUDE

B **[11]** At all material times the deceased and the first defendant were friends and have had some business dealings from time to time. The deceased has worked for the H&C subsidiaries for about 20 years and was the chairman of both companies since 1978.

C **[12]** Sometime in 1990, there was a proposal that the deceased effect a management buy-out of the H&C subsidiaries from its then shareholder, Harrisons & Crosfield Plc, a foreign company with a view to the eventual flotation of these companies on the Kuala Lumpur Stock Exchange ('KLSE'). D The intention of the proposal was that the management and control of the H&C subsidiaries would be transferred to the deceased and which would eventually encompass the then local members of the management team of the H&C subsidiaries. It would be appropriate to mention here that the first defendant was not a member of the local management team of the H&C E subsidiaries.

[13] As the deceased was in need of financial assistance to carry out the management buy-out, the first defendant proposed the participation of a group of Indonesian businessmen known as the 'Bumi Raya Utama Group' F (hereafter referred to as 'BRUG'). As a result of negotiations between the deceased and BRUG, an agreement/understanding was reached between the deceased and BRUG that the proposed management buy-out be effected on, inter alia, the following terms:

G (i) Jantoco shall be used as the corporate vehicle to acquire all the shares of the H&C subsidiaries;

(ii) Jantoco shall have a paid up share capital of RM12m;

(iii) BRUG will contribute up to a maximum amount of RM50m, part of H which shall be by way of borrowings made by Jantoco with the assistance of BRUG, for the acquisition of the H&C subsidiaries and be entitled to 60% of the share ownership of the H&C subsidiaries at par value via Jantoco;

I (iv) the deceased and his group will be entitled to up to 40% of the share ownership of the H&C subsidiaries at par value, through their ownership in Jantoco;

(v) the deceased will stay on as chairman of the H&C subsidiaries for as long as he liked;

(vi) in recognition of the deceased's long service in the H&C subsidiaries and the assurance given by the deceased that he will be able to obtain some discount to the acquisition price of the H&C subsidiaries from Harrisons & Crosfield Plc, BRUG agreed to pay a sum of RM5m to the deceased; and

(vii) the acquisition of the H&C subsidiaries will be subject to the approval of the foreign investment committee ('FIC').

[14] As the final acquisition of the H&C subsidiaries was agreed at RM52.5m, the deceased agreed to bear the excess amount of RM2.5m in the acquisition price of the H&C subsidiaries. BRUG's liability, as mentioned above, would therefore, after the set off with the aforesaid excess amount of RM2.5m in the acquisition price, be reduced to the obligation to pay a sum of RM2.5m only to the deceased.

[15] The acquisition of the H&C subsidiaries to be undertaken by BRUG via Jantoco were made by the following persons in the following percentages:

Name	Percentage of Shares Acquired
Bumi Raya International Holding Co Ltd	40.0%
Jati Ria Sdn Bhd	10.1%
Dr Lim Soon Theam	9.9%
.	60.0%

[16] The deceased and the other members of the local management team of the H&C subsidiaries were intended to acquire collectively 40% of the H&C subsidiaries via Jantoco. A 'Noah Foundation' was also then invited by the deceased to participate in the management buy-out of the H&C subsidiaries to represent bumiputera interests.

[17] Consequently Jantoco was incorporated as a private limited company on 9 March 1990.

[18] By agreement dated 22 March 1990 Jantoco agreed to purchase all the shares of the H&C subsidiaries from Harrisons & Crosfield Plc for the sum of RM52.5m.

[19] An application to the FIC for its approval to the proposed buy-out of the H&C subsidiaries was made sometimes in May 1990. At all material times, it was the intention of the deceased and BRUG that Jantoco proceeds with the flotation of its shares on the KLSE after, or as part of, the proposed acquisition of the H&C subsidiaries.

[20] On 30 June 1990, the FIC gave its letter of approval (exh P1) for the proposed acquisition of the H&C subsidiaries and one of the conditions imposed was that the foreign shareholding in Jantoco has to be reduced to not more than 30% of its total issued share capital by 31 December 1992 or at the time of the flotation of Jantoco on the KLSE. In view of the above conditions imposed by the FIC, BRUG was obliged to divest and to reduce its shareholding in Jantoco.

[21] On 31 July 1990 Jantoco held its first board of directors meeting. The minutes of this meeting showed that the deceased was chairman of the company.

[22] On 3 September 1990 the deceased sent a handwritten note (exh P3) to the first defendant which read as follows:

> 3/9/90
>
> Tay Choo Foo (Confidential)
>
> Re: Free Shares
>
> Originally it was assumed that the discount given by PLC to me would be £2,000,000/-. BRUG offered to give this to me in the form of free shares - (ie MR10,000,000/-). However when the price was increased to MR50,000,000/-, the free shares were reduced to MR5,000,000/-.
>
> Subsequently the price was finalised at MR52,500,000/-. BRUG only agree to a ceiling of MR50 Mil. In order to secure the deal, I offered to meet any additional costs from the MR5,000,000/- provided. I did this as a gesture of goodwill as the free shares would not be meant for this purpose.
>
> I stand by this commitment, which I understand could mean that the MR5,000,000/- provided may not even be enough to meet the additional costs.
>
> I further understand that this arrangement originated from Bapak Adijanto. For your information also, the offers by LARGUS and other bidders were in excess of the MR52,500,000/- secured by me.
>
> I trust the above clears all doubts.
>
> (Sign.)

[23] On 10 September 1990 the deceased and BRUG signed an 'understanding' (exh P4) which read as follows:

> Understanding between Bumi Raya Utama (BRU) and Tengku Mansor Yaacob (TUNKU) on the acquisition of Harrisons and Crossfields (M) Sdn Bhd [H&C (M)] and Harrisons and Crossfields (S) Sdn Bhd [H&C (S)].
>
> (1) In the acquisition of H&C (M) and H&C (S), TUNKU has a credit

of M$5 million in his account. BRU has also agreed with TUNKU, that the joint-venture will pay a maximum of M$50 million for the acquisition of H&C (M) and H & C (S) and the excess acquisition cost of $2.5 million would be borne by TUNKU.

(2) As such, taking into consideration the excess acquisition cost of $2.5 million, the net credit in TUNKU's account would be $2.5 million (ie, $5 million - $2.5 million).

(3) It has been agreed that the ordinary paid-up share capital of JANTOCO TRADING SDN BHD would be M$12 million divided into 12 million shares of M$1.00 each.

(4) The share holdings of JANTOCO would be:-

.	%	$'000
TUNKU	40	4,800 less 2,500 = 2,300
BRU	60	7,200
.	100	12,000

The issued shares capital would have to be fully paid-up prior to completion of the acquisition of H&C (M) and H&C (S).

(5) In the event that, the dividend amounting to M$800,000 has to paid by H&C (M) to H & C PLC., the full amount would be borne by TUNKU.

(6) It is BRU's sincere wish that TUNKU remain as the Executive Chairman of Harrisons & Crosfield, until such time that he wishes to relinquish the position.

(Sign.)

(Sign.)

On 19 September 1990, Jantoco, then a RM2 paid up company with only two shares, resolved to hold an emergency general meeting (EGM) on 26 September 1990 to issue 11,999,998 shares and, inter alia, to allot 2.6m shares to the deceased and to several others in varying amounts. Exhibit D51 which is a copy of the resolution showed that the first defendant is not named as one of the allottees.

[24] On 26 September 1990, in part implementation of the agreement/understanding between BRUG and the deceased, Jantoco issued to the deceased a share scrip (Certificate No 8) certifying that he is the registered holder of 2.6m fully paid-up shares in Jantoco.

[25] Subsequently, on 28 January 1991, ie, about four months later,

Jantoco issued to the deceased another share scrip (Certificate No 48) certifying that he is the registered holder of 1.2m fully paid-up shares in Jantoco.

[26] By a handwritten letter dated 4 July 1991 (exh P89) the deceased wrote to the first defendant as follows:

> Re our discussion today on MBO A/C. I am glad that you intend to talk to Poh Kim* about it. I would prefer to leave this matter entirely to you to finalise on my behalf.
>
> (Poh Kim' refers to one Chan Poh Kim who was then a representative of BRUG and was subsequently appointed as director in HHMB.)

[27] On 3 September 1991, Jantoco changed its name from Jantoco Trading Sdn Bhd to Harrisons Holdings (M) Sdn Bhd. Subsequently on 20 December 1991, Harrisons Holdings (M) Sdn Bhd increased its authorised share capital from RM20m to RM100m.

[28] Meanwhile the deceased agreed to sell 1.2m shares, ie, the said shares to the first defendant at its nominal value of RM1.2m ('the said purchase price') on the terms (according to the plaintiffs' claim), inter alia, that until the full purchase price is paid by the first defendant, the beneficial ownership of the said shares shall remain with and vest in the deceased. Consequently, on 27 January 1992, the deceased signed a share transfer form, ie, Form 32A (exh P5) naming the first defendant as the transferee of 1.2m Jantoco shares (Note: By then Jantoco had changed its name to Harrisons Holdings (M) Sdn Bhd). However, the said purchase price was not paid by the first defendant at all to the deceased.

[29] By letter dated 8 February 1992 (exh D40), KC Low, the company secretary of Harrisons Holdings (M) Sdn Bhd wrote to the deceased explaining therein the procedure for transfer of shares and stating that as the company is a private limited company, art 29(1) of the company's articles of association would apply; that letter, inter alia, read:

(1) Article 29 (1) of the Company's Articles states that no shares in the Company shall be transferred unless and until the rights of pre-emption have been applied. In brief:

> Every member who wish to transfer any share shall give to the Company notice in writing of such desire. The price of the share is to be agreed upon by the vendors and directors, and in the case of a difference, shall be at the price which the auditor of the Company, certify to be the fair value.

(2) Upon the price being fixed, the Company shall forthwith by notice in

writing inform each member to apply in writing to the Company within 21 days for their maximum number of shares (which is determined on a pro-rata basis). A

(3) The directors shall allocate the said shares to the members who applied within 21 days of the notice. B

(4) Only upon compliance of the above procedures, then can the shares be transferred to non-members.

(5) A Board Resolution also need to be circulated to approve the transfer of shares and to affix the common seal onto the share certificate. C

[30] By letter dated 21 February 1992 the deceased responded to exh D.40 as follows:

Mr KC Low D

Secretary

Harrisons Holdings (M) Sdn Bhd

SHARE TRANSFER

I refer to your letter dated 8th February 1992. Reference is also made to Mr Tay's letter, which was faxed to you on the 19th February 1992. E

(Sign.)

Pre-emption in Article 29 is not applicable as the acquisition of the 1.2 million shares by Mr Tay Choo Foo was agreed to and approved during the MBO time. F

As Mr Tay is desirous of having these shares transferred to him before any other consideration, please prepare the necessary resolutions.

Tunku Mansur Yaacob. G

[31] On 31 March 1992, presumably after all formalities have been complied with, the board of directors of Harrisons Holdings (M) Sdn Bhd approved the transfer of the said shares to the first defendant. On the same date, Harrisons Holdings (Malaysia) Sdn Bhd issued a share scrip (certificate No 61) certifying that the first defendant is the registered shareholder of 1.2m shares, viz, the said shares. H

[32] On 28 April 1992, Harrisons Holdings (M) Sdn Bhd changed its 'status' from that of a private limited company to a public limited company and became known as Harrisons Holdings (Malaysia) Bhd, ie, HHMB. I

[33] Sometime in June 1992, the company secretary of HHMB wrote to the deceased informing him that the share certificate relating to the said

shares which has been issued in the name of the first defendant need to be signed by two directors or a director and the company secretary and is further subjected to the signing of a resolution by the company. In the same month, Bumiputra Merchant Bankers Bhd which was involved in the proposed public listing of HHMB informed HHMB's company secretary that the transfer of the said shares from the deceased to the first defendant would constitute a breach of the FIC condition on the issue of bumiputra equity of 30% required of HHMB and that this transfer of shares to the first defendant may jeopardise HHMB's floatation exercise.

[34] On 27 October 1993, the deceased passed away without his affairs being completed with respect to, inter alia, the proposed flotation of HHMB on the KLSE. In other words, the proposed flotation exercise of HHMB was not completed at the time of the deceased's demise.

[35] On 16 December 1993, at an EGM of HHMB the first defendant, who was then a director of HHMB, was removed from the board.

[36] On 24 March 1994, a grant of letters of administration with regards to the deceased's estate was issued to the plaintiffs.

[37] By letter dated 16 January 1995, the first defendant wrote a letter marked 'Without Prejudice' (exh P88) to Tunku Mohd Johan bin Tunku Mansur, ie, the second plaintiff which read as follows:

> Re: Personal debt to the late Tunku.
>
> I refer to our tele conversation last night and I am duty-bound to explain the sequence of event pertaining to the personal debt due to your late father from Adijanto on the purchase of H & C.
>
> After several negotiations, Adijanto agreed and signed an understanding with your late father that the discount of RM5m given by PLC London shall be credited to the late Tunku's account.
>
> The Joint Venture Company, Jantoco Trading Sdn Bhd shall buy H & C, Malaysia at the cost of RM50m only.
>
> Since PLC London agreed to sell H & C to Jantoco at RM52.5m, the late Tunku agreed to pay the excess of RM2.5m from the discount of RM5m.
>
> The above transaction was then as follows:-
>
> (1) Adijanto claimed that he had credited RM2.5m into the late Tunku's account for the share of 20.83% but the late Tunku disagreed with the amount paid to him and requested we to see Chan Poh Kin and Adijanto for the outstanding amount. There was personal transaction between Adijanto and the late Tunku which was only known to them.

(2) According to the understanding signed between the late Tunku and Adijanto, Jantoco Trading Sdn Bhd (Harrisons Holding Malaysia) shall pay PLC London for RM50 million only. But, Adijanto has made Jantoco Sdn Bhd or (Harrisons) to pay RM52.5 million instead of RM50 million. This issue was not made known to other shareholders, as the late Tunku insisted that I settled this issue privately with him or his sons.

Conclusion:-

As you can see from the above, the excess of RM2.5m paid to PLC London was from the *company*, Jantoco (Harrisons Holding Malaysia) which in fact should be from *Adijanto himself*. But since the money has been paid by the company, Adijanto personally agreed with me that the RM2.5 million shall be paid to Tunku at a later date. You can check with Nova-Scotia regarding the RM52.5 million paid by Harrisons Holdings Malaysia to PLC London.

Adijanto used the company's fund to pay PLC London merely because the late Tunku had not objected to his request that Harrisons Holding used the loan from Nova-Scotia to pay for the purchase of the Company even it was agreed earlier in Singapore that Adijanto had to use cash to buy the company and at the same time giving interest free loan to the 40% shareholders nominated by the late Tunku.

Under any circumstances by whatever calculations, Adijanto still owes a minimum of RM2.5 million to the late Tunku.

By using normal common sense, there must be good reasons for the late Tunku to write letters to me explaining the credit of RM5 million and also directing me to deal with Chan Poh Kim to settle some accounts. It is not difficult to believe Adijanto must have owed something to the late Tunku. Moreover, the outstanding debt can be substantiated with evidences.

Hope the above explain the situation and I am prepared to give you further clarification together with the relevant documents. You may refer to Mr Hew Tze Yee of Singapore who worked for Adijanto before and also Dr. Lim if necessary. Mr Hew was the one who prepared the MOU and also witnessed the signing between the two parties together with Mr. Tan Hong Phang.

Regards,

(Sign.)

Tay Choo Foo.

P/S I need your co-operation on the KL High Court Suit

No S4-23-22-1994 (Defamation)

Adijanto and Three (3) Others vs Tay Choo Foo.

[38] On 23 May 1995, the first defendant lodged a police report in Kuching (exh P92) which reads:

I was/am a shareholder owing 10% equity in Jantoco Trading Sdn.Bhd., (JANTOCO) from the April,1990 onward. I was a director from the July, 1990 to 16 December, 1993 in 199O. JANTOCO acquired Harrisons and Crossfield (M) Sdn Bhd and Harrisons and Crossfield (S) Sdn Bhd., The 3 H & C Companies).

The official acquisition take over price was agreed at RM52.5 million. It was then agreed between Mansur and Bumi Raya International Holding Co.Ltd, (BRUG) both share holders in JANTOCO, that JANTOCO would pay a maximum of RM50 million and the excess of RM2.5m would be paid by BRUG through Tunku Mansur as per document attached (MOU). Tunku Mansur did not pay the excess sum of RM2.5 million as he in turn was not paid by BRUG. However JANTOCO paid the excess sum of RM2.5 million to the Vendors of the 2 H & C companies instead, apparently on behalf and for the benefits of BRUG as per directors meeting.

The person controlling BRUG was/is Adijanto an Indonesian national as indicated by the above (MOU). As a share holder of Jantoco, I perceived that the payment of the excess sum of RM2.5 million by Jantoco to the Indon vendors was an irregular payment. I therefore request that such action be investigated for possible criminal offence by Adijanto and/or other person(s) in BRUG.

Endorsed at the end of the copy of the report were the following:

KEPUTUSAN SIASATAN:

(1) Kes tiada Siasatan Polis.

(2) Lapuran untuk rujukan pihak berkenaan sahaja.

The above endorsement, to us, would denote that the police did not pursue the complaint and did not carry out any police investigation.

[39] Sometime in the month of October 1998, the plaintiffs were informed by HHMB in respect of a declaration of dividend payment to their shareholders. By letter dated 10 November 1998, the plaintiffs informed HHMB of the plaintiffs' claim for the title to the said shares and all the rights, title, interest and benefits arising out of, or accrued to, the said shares including the dividend to be paid to the holder of the said shares. By letter also dated 10 November 1998, the plaintiffs made a demand against the first defendant intimating, inter alia, that the first defendant is liable to pay the said purchase price for the said shares, failing which the plaintiffs shall commence proceedings to, inter alia, recover the said shares from the first defendant. The first defendant failed or refused to comply with the aforesaid demand and hence, on 27 November 1998 the plaintiffs filed this suit.

THE PLAINTIFFS' CASE

[40] It is the plaintiffs' case that after the death of the deceased, the first defendant was in communication with them from time to time and on several

occasions made express admissions that he has not paid the said purchase price to the deceased for the said shares but insisted that the said shares were given to him by the deceased for free.

[41] The plaintiffs averred that the first defendant is obliged to pay the said purchase price for the said shares and has until to date failed or refused to make such payment to the deceased or the plaintiffs. Alternatively, the plaintiffs averred that the transfer of the said shares to the first defendant was made without any consideration at all and it is unlawful and unconscionable for the first defendant to retain ownership of the said shares.

[42] The plaintiffs contended that the respective transfers of the said shares, which had by then increased to a total of 4,580,600 shares as a result of the bonus issue, between the first, third, fourth and fifth defendants were direct transfers with no monetary consideration in spite of the fact that the said shares were and still are being traded on the KLSE.

[43] The plaintiffs also contended that the third, fourth and fifth defendants were at all material times and still are the first defendant's nominees and that the various share transfers referred to above were a collective attempt by the first, third, fourth and fifth defendants to evade, circumvent and/or frustrate the recovery of the said shares now totalling 4,580,600 shares by the plaintiffs.

[44] The plaintiffs prayed for the following reliefs:

(a) a declaratory order that the plaintiffs are the beneficial owners of the said shares, now totalling 4,580,600 shares and presently registered in the names of the first, third, fourth and fifth defendants and are entitled to the return of the said shares from the first, third, fourth and fifth defendants together with all rights, title, interest and benefits, including all moneys, dividend, bonus issue or other distributions, arising out of, or accrued under, the said shares which were, and will be, acquired by the first, third, fourth and fifth defendants as the registered holder of the said shares;

(b) an order that the first, third, fourth and fifth defendants be restrained, whether by itself or its servants or agents or otherwise, from selling, transferring, assigning, charging or howsoever dealing with or disposing of the said shares now totalling 4,580,600 shares and all or any of the rights, title, interest and benefits, including all moneys, dividend, bonus issue or other distributions, arising out of, or accrued under, the said shares acquired by the first, third, fourth and fifth defendants to any third party;

(c) an order that HHMB be restrained, whether by itself or its servants or

agents or otherwise, from giving, extending or paying any money, dividend, bonus issue or any other rights, title, interest or benefits, including all moneys, dividend, bonus issue or other distributions, arising out of, or accrued under, the said shares now totalling 4,580,600 shares to the first, third, fourth and fifth defendants;

(d) an order that HHMB rectifies its register of members by deleting all entries relating to the first, third, fourth and fifth defendants and substituting thereto the plaintiffs as the owners of the said shares now totalling 4,580,600 shares in their capacity as the administrators of the estate;

(e) an order that all rights, title, interest and benefits, including all money, dividend, bonus issue and other distributions arising out of, or accrued under, the said shares now totalling 4,580,600 shares be retained by HHMB and/or placed in a fixed deposit account with a bank in Kuala Lumpur until the disposal of this action or until further order;

(f) costs of the action; and

(g) any other relief or order which this honourable court deems fit.

THE FIRST DEFENDANT'S CASE

[45] The first defendant contended that it was agreed between the deceased and him that in the management buy-out of the H&C subsidiaries, any shares personally allotted to or personally acquired by the deceased were to be divided equally between the deceased and him as consideration to his goodself for arranging the participation of BRUG in the transaction (para 9 of the statement of defence).

[46] The first defendant also contended that it was also agreed between the deceased and his goodself that he (the first defendant) will pay any excess amount should the acquisition be in excess of RM55m. To support his claim that there was such an agreement, the first defendant introduced the following document (exh D59), which was brought to knowledge of the plaintiffs for the first time and only at the trial, and argued that this document showed his entitlement to the said shares; exh D59 reads as follows:

UNDERSTANDING
RE: ACQUISITION OF HARRISON & CROSFIELD
IT IS UNDERSTOOD AND AGREED BETWEEN us the undersigned with regards to the above matter as follows:

(a) in negotiation with Bumi Raya Tunku Mansur at the request of Tay Choo Foo will ask for a contigency fund of M$5,000,000 to be credited to.Tunku's credit.

(b) if request is accepted then Tay Choo Foo will agree with Tunku to talk on behalf of Bumi Raya for the takeover of Harrison & Crossfield at M$50 Mil. And to be responsible for any amount above that figure.

(c) Tay Choo Foo agrees with Tunku that any excess above the M$50 Mil will be paid from the contigency fund and any excess above that will be borne solely by Tay Choo Foo.

Dated this 1 July 1990.

(Sign.)

TUNKU MANSUR

(Sign.)

TAY CHOO FOO

[47] The first defendant contended that it was further agreed that the deceased's representative in the management buy-out will own 40% of the shares in Jantoco. However, the deceased requested for his (the first defendant) agreement to allot 10% each of the shares in Jantoco to Noah Foundation and the local management team of H&C subsidiaries respectively and that the balance of 20% shares be divided equally between the deceased and his goodself amounting to 1.2m shares each.

[48] The first defendant denied that the deceased had agreed to sell the said shares to him at the nominal value of RM1.2m on the terms, inter alia, that until the said purchase price is paid by him, the beneficial ownership of the said shares shall remain with and vested in the deceased. He contended that the said shares belong to him as a result of the agreement between the deceased and his goodself.

[49] The first defendant then stated that at the request of the deceased, the said shares were registered in the deceased's name to comply with the FIC's requirement that 30% of Jantoco's shares be held by bumiputras. Subsequently the said shares were transferred to him (the first defendant) on 31 March 1992.

[50] The first defendant denied that he has not paid for the said shares and placed the burden on the plaintiffs. He contended that the plaintiffs, prior to the filing of the suit, never claimed the said shares from him. He then claimed that Tunku Mohd Adam bin Tunku Mansur, ie, the fourth plaintiff had earlier approached him to buy the said shares and this was within the knowledge of the Tengku Mohd Saad @ Tengku Arifaad bin Tengku Mansur, the first plaintiff. This, he insisted, showed that the plaintiffs have knowledge that the said shares are his. He stated that even the deceased never claimed the

A said shares from him.

THE THIRD, FOURTH AND FIFTH DEFENDANTS' CASE

B **[51]** The third, fourth and fifth defendants' contended that the first defendant transferred the 4m shares to the third defendant with the following objective, namely:

(a) that 1 million shares was a gift inter vivos to the third defendant and the balance of 3m shares were to be held on trust for the benefit of the
C fourth and fifth defendants and one Tay Hui Yee;

(b) arising out of that trust, the third defendant with the consent of the first defendant subsequently transferred:

D (i) 1 million shares to the fourth defendant;

(ii) 1 million shares to the fifth defendant; and

(iii) 1 million shares to the said Tay Hui Yee.

E **[52]** It is also their contention that the 4m shares were transferred without any objections from the plaintiffs. Further, the dividends were declared in their names.

AGREED ISSUES TO BE TRIED

F

[53] At the outset, the issues to be tried as agreed to by the parties were as follows:

(a) whether there was an agreement for the sale and purchase of the said shares between the deceased and the first defendant at the price of
G RM1.2m; and

(b) whether the deceased and the first defendant had at all agreed that the beneficial interest in the said shares remain with the deceased pending the full and final settlement of the purchase price by the first defendant.

H

THE JUDGMENT OF THE HIGH COURT

[54] At the end of the trial, the learned judge found that the plaintiffs have proven on the balance of probabilities their claim against the defendants and
I hence allowed the plaintiffs' claim with costs and made the orders prayed for, except that as far as HHMB, ie, the second defendant is concerned, he made no order as to costs. His reason for making no order as to costs against HHMB was grounded on his finding that HHMB was only a nominal defendant in this case. In relation to this, counsel for HHMB had submitted

that HHMB is a neutral party and would abide by any decision and orders made by the court at the conclusion of the trial. The first, third, fourth and fifth defendants appealed.

[55] In relation to the said shares, now totalling 4,580,600 shares after the bonus issue, the learned judge made the following findings:

(i) that the plaintiffs have proven on a balance of probabilities that the first defendant is holding the said shares on trust for the deceased; and

(ii) that the first defendant, after the commencement of this suit and in breach of his undertaking vide encl (17), transferred the said 4m shares to the third defendant without any valuable consideration;

(iii) that the third, fourth and fifth defendants are constructive trustees of the said 4m shares held in their respective names for the deceased's estate;

(iv) that the third defendant took the transfer of the said 4m shares although she has knowledge of the first defendant's undertaking in encl (17) and that from the said 4m shares, the third defendant subsequently transferred 1m shares each to the fourth and fifth defendants also without any valuable consideration; and

(v) that the third, fourth and fifth defendants are constructive trustees of the said 4m shares held in their respective names for the deceased's estate.

[56] In coming to his finding that the plaintiffs have proven their case against the defendants, the learned judge said he relied on the evidence of Gabriel Patrick O'Holohan (PW2); he said:

> I accept the evidence of PW2 of the fact that he was told by the late Tunku Mansur that the first defendant was to pay a sum of RM1.2m to the late Tunku Mansur as consideration for the said 1.2m shares transferred by the late Tunku Mansur to the first defendant and that it was agreed between the late Tunku Mansur and the first defendant that until the first defendant pays the sum of RM1.2m, the beneficial ownership of the [s]aid 1.2m shares shall remain with, and vest with the late Tunku Mansur. The first defendant never paid the said RM1.2m to the late Tunku Mansur or the plaintiffs. Although PW2's knowledge of the matter came from what were told to him by the late Tunku Mansur, I am of the view that PW2's evidence on the matter are admissible under s 32(1)(b) of the Evidence Act 1950 which provides as follows:
>
> > 32. Cases in which statement of relevant fact by person who is dead or cannot be found, etc. is relevant.
> >
> > (1) Statements, written or verbal, of relevant facts made by a person who is dead ... are themselves relevant facts in the following cases:

A (a) ...

(b) when the statement was made by any such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business or in the discharge of professional duty; or of an acknowledgment written or signed by him of the receipt of money, goods, goods, securities or property of any kind; or of a document used in commerce, written or signed by him, or of the date of a letter or other document usually dated, written or signed by him.

C I find the evidence in this case showed that PW2 was the late Tunku Mansur's good and trusted friend and confidante for more than 33 years, ie from 1960 until the late Tunku Mansur's demise on 27 October 1993. The late Tunku Mansur appointed PW2 as his power of attorney on 2 September 1977 via a power of attorney (exh P77). Under the power of attorney, PW2 was granted very wide D power that would allow PW2 to do practically everything which the late Tunku Mansur could do himself and PW2 was to look after the late Tunku Mansur's personal and business affairs when the late Tunku Mansur was away. This power of attorney was never revoked.

E PW2 had stated that the late Tunku Mansur consulted and kept PW2 informed on practically every aspect of his business dealings and personal affairs. The late Tunku Mansur informed and discussed with PW2 on matters relating to the MBO from the inception of the idea, the involvement of BRUG, its completion and the transfer of the said 1.2m shares by the late Tunku Mansur to the second (sic) defendant. At all material times, PW2 was the holder of the power of attorney of F the late Tunku Mansur.

For the foregoing reasons, I am of the considered view that the statements made by the late Tunku Mansur to PW2 relating to the MBO and the transfer of the said 1.2m shares to the first defendant were statements made in the ordinary course of business and thus come within the exception of s 32(1)(b) of the Evidence Act G 1950.

[57] The learned judge was of the view that the words 'in the ordinary course of business' appearing in s 32(1)(b) of the Evidence Act 1950 ('the H Act') should be given 'a broad and liberal connotation' and for support referred to *Devi Singh v Mt Phulma* AIR 1961 HP 10. He also referred to *Ramamurthi v Subba Rao* AIR 1937 Mad 19 where the court was of the view that the words 'in the course of business' appearing in s 32(2) of the Indian Evidence Act means the way the business (which may be of a purely private or even trivial nature) is conducted and have no connection with the course I of business suggesting a series of acts of business. The learned judge then said:

Based on the above cited case authorities it is my view since PW2 was at all material times the holder of a power of attorney from the late Tunku Mansur and was required to manage the business and personal affairs of the late Tunku Mansur

anytime when he was away, all statements made by the late Tunku Mansur to PW2 with regard or pertaining to his business and personal affairs would necessarily be statements made in the 'ordinary course of business' and therefore admissible in evidence. I also find that PW2 is a credible and reliable witness. PW2 is not an interested witness and he did not have any pecuniary interest in the outcome of the present suit.

[58] In relation to the issue as to whether the first defendant has to pay the sum of RM1.2m to the deceased as consideration for the said shares, the learned judge said:

It is incontrovertible that the late Tunku Mansur and the first defendant executed the transfer form on 27 January 1992 (exh P5) and the consideration for the transfer was stated as RM1.2m. Stamp duty for the said transfer calculated based on a consideration of RM1.2m was paid on 28 January 1992 to the collector of stamp duty. The transfer form (exh P5) was subsequently submitted by the first defendant to the second defendant on 7 February 1992 to have the transfer effected. The first defendant claimed that the consideration of RM1.2m was filled in the transfer form (exh P5) to comply with the requirement of PW7, the second defendant's company secretary. However the contemporaneous documents and the objective facts do not support this claim of the first defendant as the transfer form (exh P5) has been duly completed and executed before the first defendant submitted the same to the second defendant. Instead the contemporaneous documents and the objective facts clearly lend support to the plaintiffs' claim that the first defendant was to pay RM1.2m for the said 1.2m shares.

[59] As to whether the first defendant has paid the sum of RM1.2m for the said shares to the deceased, the learned judge found as follows:

It is my finding that it is an undisputed fact that the first defendant never paid any money to the late Tunku Mansur for the said 1.2m shares. In his defence, the first defendant pleaded that the shares to be given or acquired by the late Tunku Mansur personally in the MBO were to be divided equally between the first defendant and the late Tunku Mansur as the first defendant has agreed to pay for any acquisition price in excess of RM55m. In support of this contention exh D59 was introduced in evidence by the first defendant during the cross-examination of PW1. However, in his witness statement (DWS1), the first defendant took a different position and claimed that the late Tunku Mansur and him would share 'whatever money' (as opposed to shares) that they get from BRUG and therefore the issue of him having to pay for the said 1.2m shares never arise.

[60] In relation to the issue as to whether the beneficial ownership of the said shares shall remain with, and vest with the deceased until the first defendant pays the said sum of RM1.2m, the learned found as follows:

A It is clear from the evidence of PW2 that it was agreed between the late Tunku Mansur and the first defendant that the first defendant was to hold the said 1.2m shares for the late Tunku Mansur until the first defendant pays for them.

B **[61]** The learned judge found that the first defendant's testimony was not in tangent with his case as pleaded on the following issues:

(a) his claim that he was entitled to the said shares for free;

(b) his claim that his entitlement to the said shares was due to his agreement with the deceased to pay for any acquisition price in excess of RM55m and which agreement was only produced for the first time at the trial (exh D59) (reproduced earlier); and

C

(c) the first defendant's claim that he was entitled to half of the RM5m credit given by BRUG.

D In relation to these issues, the learned judge said:

> On the first defendant's claim of having negotiated for the payment of a sum of RM5m by BRUG to the late Tunku Mansur, I find it is not supported or borne out by the contemporaneous documents and the objective facts of this case. In fact the contemporaneous documents and the objective facts contradicted the first defendant's claim that he negotiated for the payment of the said sum of RM5m from BRUG.
>
> I also find that the need for the late Tunku Mansur to write exh P3, the handwritten note dated 3 September 1990 from the late Tunku Mansur to the first defendant clearly shows that the first defendant was not involved in the negotiations with BRUG as the late Tunku Mansur has to explain to the first defendant in some details as to how the said RM5m credit given by BRUG came about.
>
> It is also noted that in his evidence given in Civil Suit No S4–23–22 of 1994 ('defamation suit'), the first defendant said that exh P3 was written by the late Tunku Mansur to explain the late Tunku Mansur's entitlement to RM2.5m from BRUG so that the first defendant could speak to BRUG on behalf of the late Tunku Mansur. At p 75 of exh 130 (ie the notes of evidence of the evidence given by the first defendant in Civil Suit No S4–23–22 of 1994), the first defendant said as follows:
>
> > The late Tunku was trying to get the money from BRUG, ie either from the first plaintiff or fourth plaintiff. When he couldn't get it on a few occasions, he asked me whether I was willing to speak to them.
> >
> > The first, third and fourth plaintiffs gave the impression to the staff that this money is some kind of 'undertable money' resulting in the late Tunku facing difficulty in raising the issue again.
> >
> > The late Tunku then hinted that since I was the one who brought in the plaintiffs, he tried to convince me that this RM2.5m was his entitlement as gratuity to be paid ...

E F G H I

During cross-examination, the first defendant said it was by exh P3 that the late Tunku Mansur explained to him with regard to the benefits given by Harrisons & Crossfield to the management buy-out team. The late Tunku Mansur also told him the reasons why the management buy-out team was given preference to justify him to demand RM5m from Bumi Raya Utama Group.

From the facts and documentary evidence adduced, it is my finding that the first defendant's claim to half of the said RM5m credit given by BRUG was an afterthought created after the plaintiffs demanded for payment or return of the shares in the second defendant registered in the first defendant's name.

It is my finding that I cannot accept exh 41 supports the first defendant's claim that he was not required to pay for the said 1.2m shares in the second defendant. Exhibit 41 in fact lends support to the plaintiffs' contention that the late Tunku Mansur had agreed to sell the said 1.2m shares to the first defendant during the MBO time. Exhibit 41 is a letter written by the late Tunku Mansur to persuade the second defendant's company secretary (PW7) to give effect to the transfer form (exh P5), which gave the consideration for the transfer as RM1.2m.

With regard to the words 'free shares' in exh P3 I am of the view that it was in reference to the free shares to be given by BRUG to the late Tunku Mansur.

[62] In the course of the proceedings, the defence introduced in evidence the minutes of the first shareholders meeting (exh D105) of Jantoco held on 11 April 1990. Amongst those present were the deceased who was described therein as 'chairman and shareholder' and the first defendant who was described therein as 'shareholder'. In relation to this, the learned judge said:

On exh D105 at best the first defendant could only use it to show that he attended the first shareholders meeting of the second defendant on 11 April 1990 but not to show that he was already a shareholder of the second defendant at the time of the meeting as he was not.

[63] With regards to the evidence of the first defendant, the learned judge said:

As regards the evidence of the first defendant (DW1) I do not accept his evidence as to the following:

(1) that the first defendant was at all material time the true owner of the shares in dispute;

(2) that the said shares belong to the first defendant by reason of an agreement between the first defendant and the late Tunku Mansur.

(3) that the first defendant arranged for a third party to finance a management buy out of the second defendant;

(4) that in return Tunku Mansur agreed that any shares in the second defendant allotted to Tunku Mansur would be shared equally between Tunku Mansur and the first defendant.

I find that the first defendant is not a credible witness. He was found to be evasive and gave contradictory evidence. The first defendant has said in evidence that when the late Tunku Mansur asked him to work with him on the MBO, there was an 'understanding or agreement' between the late Tunku Mansur and him that 'whatever money' (as opposed to shares as pleaded in his defence) they get from BRUG would be shared equally and that the first defendant would bear all costs in excess of RM55m. This 'understanding or agreement' was said to have been reached in early 1990.

On the above contention of the first defendant, it must be emphasised that although the first defendant had in his evidence claimed that under he understanding or agreement between the late Tunku Mansur and him the had agreed to share 'whatever money' they get from BRUG equally, the first defendant's defence only pleaded that the shares to be given to or acquired by the late Tunku Mansur personally were to be divided equally between the first defendant and the late Tunku Mansur.

[64] In relation to exh D59 (reproduced earlier) the learned judge said:

It is my finding that the terms set out in exh D59 are ambiguous and written using future tenses. As such the plaintiffs could only speculate as to what were in fact agreed therein. Reading the terms in exh D59 literally, it would seem that by exh D59 the late Tunku Mansur would, at the first defendant's request and when negotiating with BRUG, ask BRUG for a contingency fund of RM5m. The question that may be posed here is why would the late Tunku Mansur need to negotiate with BRUG for the contingency fund when the late Tunku Mansur and BRUG had already agreed on the same sometime before the sale and purchase agreement was entered into between H&C Plc and the second defendant on 23 March 1990. (See (exh P83)). It is also to be noted that as at the date of exh D59 (ie 1 July 1990), the price for H&C subsidiaries had been fixed at RM52.5m and the sale and purchase agreement dated 23 March 1990 (exh P83) had already been executed. The question then why was a need for the first defendant to talk on behalf of BRUG?

It is my considered view taking into consideration the facts and circumstances of this case the late Tunku Mansur could not have possibly prepared and signed exh D59 nor agreed to the terms therein. There was not an iota of evidence that the purchase price of H&C subsidiaries during the negotiation between the late Tunku Mansur and H&C Plc might be finalised at a price that exceeds RM55m. In any event it makes no sense at all that the first defendant was prepared to pay for the excess amount if the takeover price of H&C subsidiaries is above RM55m, when the first defendant would not get anything in return for such payment.

I also find the first defendant has failed to provide evidence as to his financial position in 1990 to show that he was in the financial position to pay for any amount in excess of RM55m. If fact it is noted that the first defendant avoided providing such evidence although he was reminded of the same during cross-examination. On this point it would be reasonable to invoke that adverse inference should be presumed, under s 114(g) of the Evidence Act 1950 against the first defendant as to his financial ability at the time when exh D59 was purportedly

to have been entered. This is because unless the first defendant was in a financial position to pay for the excess amount if the price exceeds RM55m, there was no reason why the late Tunku Mansur should enter into the understanding in exh D59 with the first defendant.

The first defendant claimed that the understanding in exh D59 was reached in early 1990 during the negotiations for the acquisition of H&C subsidiaries. However no credible explanation was given as to why exh 59 was only prepared and signed by the late Tunku Mansur and the first defendant allegedly on 1 July 1990. If it is true that exh D59 was signed on 1 July 1990, why would it be necessary for the late Tunku Mansur to later on 3 September 1990 write to the first defendant (exh P3) to explain 'further his entitlement to' the said RM5m credit.

It is to be noted in exh D59, H&C Plc was spelt as 'Harrison & Crossfield' when the correct spelling should be 'Harrisons & Crosfield' as can be seen from exh P83. I am of the view that if it is true that the late Tunku Mansur prepared exh P59, he would not have spelt wrongly, the name of the company that he had worked for about 20 years. I find exh D59 which was purportedly signed on 1 July 1990 is full of grammatical errors and is an ambiguous and oblique document. Beside the grammatical errors which are patently obvious on the face of the document, the contents thereof are clearly inconsistent with contemporaneous facts, namely as follows:

(1) Before exh P83 was executed BRUG and Tunku Mansur had already agreed that Tunku Mansur would get free shares worth RM5m if Tunku Mansur could get H&C Plc to sell H&C subsidiaries at RM50m.

(2) When the purchase price was finalised at RM52.5m, BRUG only agreed to proceed with the acquisition after the late Tunku Mansur offered to meet the additional RM2.5m from the said RM5m credit.

(3) The sale and purchase agreement for the acquisition of H&C subsidiaries for RM52.5m was subsequently executed on 22 March 1990 (exh P83), which is more than three months before exh D59 was purportedly signed.

[65] The learned judge was of the view that it has been established through the evidence of the PW1 (the fourth plaintiff), PW2 (Gabriel Patrick O'Holohan), PW3 (the third plaintiff), PW4 (the second plaintiff), PW5 (the first plaintiff) and the first defendant himself that the deceased had a good command of the English language and would not sign any document which have grammatical errors such as exh D59. The learned judge then said:

PW5 on the other hand has given evidence that the signature on exh D59 purportedly to be Tunku Mansur's was in fact signed by him imitating Tunku Mansur's signature not long after the death of the late Tunku Mansur. PW5 stated that exh D59 was prepared by the first and third defendants and they requested

him to imitate Tunku Mansur's signature thereon. PW5 agreed to imitate the late Tunku Mansur's signature on exh D59 after the first defendant at that time said that he needed something in writing with regard to his participation in the second defendant in order for him to take on BRUG for the late Tunku Mansur's family.

Notwithstanding the evidentiary value of exh D59 and the importance of this document to the first defendant's defence, it is my finding that the first defendant had not only failed to specifically plead exh D59 in his defence filed on 30 October 1998 but has also failed to plead the same in his amended defence which was amended pursuant to an order dated 1 December 1999. It is also noted that the first defendant has never exhibited exh D59 in any of the first defendant's applications to strike out the present action, namely encl (20) (filed on 3 June 1999) and encl (41) (filed on 21 December 1999). The first defendant also did not inform the plaintiffs of the existence of exh D59 or showed the same to them before the plaintiffs commenced the present action on 27 November 1998. It was only on 10 September 1999 (ie nearly ten months after this action was commenced) that the first defendant showed exh D59 to the second plaintiff (PW4) in Kuching.

Still on the issue of exh D59 it has to be stated here that the first, third, fourth and fifth defendants strenuously opposed the plaintiffs application at the close of the defendants' case to refer exh D59 for an expert opinion as to the veracity of the signature purportedly to be Tunku Mansur's (see encl (192)). This court however dismissed the plaintiffs' application in encl (192), inter alia, stating that the court at that stage of the proceedings was still in a position to evaluate the evidence of the relevant witnesses whether to believe them or not without the need of the expert evidence of a document examiner relating to exh D59. It is also in evidence that the plaintiffs as administrators of the estate of Tunku Mansur have never seen exh D59 amongst the documents in the possession of the estate of Tunku Mansur.

[66] In relation to the RM5m credit which is to be given by BRUG, the learned judge noted that in his defence, the first defendant claimed that it was agreed between the deceased and his goodself that any shares given to or acquired by the deceased would be divided equally between them but in his evidence during the trial, he 'extended' his claim by insisting that the deceased and his goodself are to share the said RM5m credit equally. The learned judge also noted that the first defendant has also made the following claims:

(a) that he was the one who negotiated with BRUG for the RM5m credit;

(b) that when the price for the H&C subsidiaries was finalised at RM52.5m by H&C Plc, BRUG insisted that the deceased and his goodself pay the RM2.5m from the RM5m credit from BRUG; the first defendant also claimed that it was he, the deceased and BRUG that made the decision on the purchase price of RM52.5m;

(c) that the written 'understanding' dated 10 September 1990 (exh P4) signed between the deceased and BRUG was 'merely a recording of the

earlier understanding between' the deceased, his goodself and BRUG wherein BRUG agrees to pay the RM5m credit to the deceased and his goodself; in other words, the first defendant is claiming that pursuant to the 'understanding' (exh P4), BRUG's obligation to pay the said RM5m credit was owed jointly to both the deceased and his goodself.

[67] The learned judge then found that the first defendant's claim for half of the said RM5m credit 'is totally inconsistent with the following reasonings':

(1) If the first defendant is entitled to half of the RM5m credit and BRUG was to pay the same to the late Tunku Mansur and him, I find there is no reason for the first defendant not to be made a party to the understanding in exh P4.

(2) I also find the first defendant has given evidence that the late Tunku Mansur had to write to him on 3 September 1990 (exh P3) to explain how the late Tunku Mansur obtained his entitlement to the RM5m credit. This is totally inconsistent with the first defendant's claim that he was the one who negotiated with BRUG for the RM5m credit. If such was the case, the first defendant would not need the late Tunku Mansur to explain how the RM5m credit was arrived at.

(3) The first defendant has also given evidence that when he was requested by the late Tunku Mansur to pursue with BRUG for the balance RM2.5m of the RM5m credit, the first defendant requested the late Tunku Mansur to give him 'something in writing', ie a written authority to pursue the matter with BRUG so that BRUG would not call him a 'busybody'. The late Tunku Mansur was then said to have written exh P89 (handwritten note dated 4 July 1991) to the first defendant. It is my view that the first defendant would not need to ask for the such written authority if indeed the first defendant's agreement with the late Tunku Mansur was that he is entitled to half of the said RM5m credit and BRUG has knowledge of and/or bound to pay the said RM5m to both the late Tunku Mansur and the first defendant.

(4) It is noted that prior to the commencement of the present action and before the commencement of the trial on 25 September 2000, the first defendant has never claimed that he was entitled to half of the said RM5m credit as he is maintaining now. In the defamation suit filed by Bapak Adijanto of BRUG and three others against the first defendant in Kuala Lumpur High Court Civil Suit No S4–23–22 of 1994 ('Defamation Suit'), the first defendant has in his defence and evidence maintained that the said RM5m credit was the entitlement

of the late Tunku Mansur. At no time did the first defendant mention that he and late Tunku Mansur were jointly entitled to the said RM5 credit.

In fact when giving evidence in the said defamation suit on the issue of the balance of RM2.5m from the said RM5m credit, the first defendant said at p 75 of exh P130 as follows:

> The late Tunku was trying to get the money from BRUG, ie either from the first plaintiff or fourth plaintiff. When he couldn't get it on a few occasions, he asked me whether I was willing to speak to them.
>
> The first, third and fourth plaintiffs gave the impression to the staff that this money is some kind of 'undertable money' resulting in the late Tunku facing difficulty in raising the issue again.
>
> The late Tunku then hinted that since I was the one who brought in the plaintiffs, he tried to convince me that this RM2.5m was his entitlement as gratuity to be paid.

It is my view that the late Tunku Mansur would not need to convince the first defendant of his entitlement of the said RM2.5m if the first defendant's claim that BRUG promised to pay the said RM5m to him and the late Tunku Mansur is true.

[68] The learned judge also noted that in his police report (exh P92) the first defendant never mentioned at all about his alleged joint entitlement with the deceased to the said RM5m credit.

[69] With regards to the claim of the first defendant that he is entitled to the said shares for free, the learned judge said:

> The first defendant in his evidence claimed that the balance of 20% shares, after distribution to Noah Foundation and the MBO would be shared equally between Tunku Mansur and him. I find that this claim for the said 1.2m shares by the first defendant is totally inconsistent with the evidence in the present action for the following reasons:
>
> If the first defendant's allegation that he and Tunku Mansur were to share the said RM5m credit equally is true and since a sum of RM2.5m was used by BRUG to pay on behalf of the late Tunku Mansur for 2.5m shares in the second defendant, it would appear that the first defendant should be claiming for 1.25m shares (or 10.42% of the equity in the second defendant) instead of 1.2m shares.

[70] With regards to the case against the third, fourth and fifth defendants, counsel for these defendants had contended before the learned judge that the plaintiffs' claim against them as constructive trustees should be dismissed as

the plaintiffs have failed to plead this and that even if it is assumed that it is pleaded that the third, fourth and fifth defendants are constructive trustees, the plaintiffs' claim would fail as the plaintiffs had failed to establish the following:

(i) that the said 4m shares are the subject matter of a trust before they were transferred to the third, fourth and fifth defendants;

(ii) that the third, fourth and fifth defendants had knowingly or dishonestly assisted the first defendant in committing a breach of trust, ie, the ingredients of the doctrine of 'dishonest assistance' were not proven to be present; or

(iii) that the third, fourth and fifth defendants had received the said 4m shares with knowledge that these shares were transferred in breach of trust, ie, the ingredients of the doctrine of 'knowing receipt' were not proven to be present.

[71] With regards to the arguments raised above, the learned judge was of the view that the essential ingredients to sustain an action against the third, fourth and fifth defendants as constructive trustees for the said 4m shares have been sufficiently pleaded; the learned judge said:

> The plaintiffs need not expressly plead that the third to fifth defendants are constructive trustees of the said 4,000,000 shares. In the case of *Koh Siak Poo v Sayang Plantation* [2002] 1 MLJ 65, the Court of Appeal cited with approval the following statement on the necessity to plead only material facts made by Scrutton LJ in *Lever Brothers Ltd v Bell* [1931] 1 KB 557:
>
> > The practice of the courts is to consider and deal with the legal result of pleaded facts, although the particular legal result alleged is not stated in the pleading.
>
> In that case, the Court of Appeal held that the necessary facts to sustain a cause of action for money had and received have been sufficiently pleaded in the statement of claim. The fact that the defendant was in no way misled by what the plaintiff was seeking to prove or establish is confirmed by the defendant's defence in the way in which the defendant has answered the allegations in the statement of claim.
>
> I am also of the view that the existence or non-existence of constructive trust is a question of law and not of fact and therefore it arises by operation of law. Constructive trust comes into existence when it is unconscionable for the legal owner of the property to assert beneficial ownership of the property. A constructive trust is sometimes referred to as an implied trust. In the case of *Pathma d/o Naganather & Anor v Nivedita d/o Naganather (No 1)* [2002] 6 MLJ 361, Abdul Malik Ishak J on this point had this to say:
>
> > A constructive trust, on the other hand, is sometimes referred to as an implied trust. A case in point would be where the court in exercising its equitable jurisdiction, imposes a trust on a party who has the control of the property of

which he is not entitled to. The trust is presumed to exist otherwise it would be difficult for a person claiming the beneficial interest to the property to stake his claim. It is pertinent to note that constructive trusts have developed by leaps and bounds (*Boase v Cluny Rubber Estate Ltd* [1913] 1 FMSLR 130, *Paruvathv d/o Murugiah v Krishnan s/o Doraisamy* [1983] 2 MLJ 121 and *Muschinski v Dodds* (1985) 160 CLR 503) over the years.

It is my finding that the plaintiffs have pleaded sufficient material facts in the amended statement of claim to sustain the claim that the third, fourth and fifth defendants were and still are the constructive trustees of the said 4,000,000 shares held under their names. There is no necessity for the plaintiffs to expressly plead that the third to fifth defendants are constructive trustees of the said 4,000,000 shares. In any event it is clear that they were in no way misled by what the plaintiffs were seeking to prove or establish from the defence filed by them.

[72] With regards to the doctrines of 'dishonest assistance' and 'knowing receipt' raised by the third, fourth and fifth defendants, the learned judge was of the view that the said doctrines have no application in the instant case 'as such doctrines would only be applicable if the plaintiffs are pursuing personal remedy against the third, fourth and fifth defendants'. He was of the view that in the instant case 'the plaintiffs are only pursuing their proprietary remedy/claim (as opposed to personal remedy/claim) that allows them to follow or trace the trust property (which in this case is the said 4m shares) to the third, fourth and fifth defendants' and that in the case of proprietary remedy 'it matters not that the person who is holding the trust property commit no wrongdoing'.

[73] The learned judge then went on to say as follows:

Where a property is subject to a trust, the trust follows the legal estate wherever it goes, unless it comes into the hands of a purchaser for valuable consideration without notice. On this point I would like to refer to *Halsbury's Laws of England* (4th Ed 2000 Reissue) Vol 48 at para 598 as follows:

Acquisition without notice of trust. A person who, without notice of the trust, acquires property or an interest in property which is in fact subject to a subsisting trust takes the property as and subject to the performance of the trust if he acquires gratuitously either the legal estate or an equitable interest of the property ...

Even if he no longer has the trust property or its traceable proceeds, a person who acquire the trust property may be liable as a constructive trustee on the basis of knowingly receipt or dealing. However, a recipient of trust money will not be personally liable if he pays it away to a third party where at the date of payment he was ignorant of the existence of the trust.

In the case of *Foskett v McKeown & Anor* [2000] 3 All ER 97 at 122 f–h, Lord Millet observed as follows:

... A beneficiary's claim against a trustee for breach of trust is a personal claim. It does not entitle him priority over the trustee's general creditors unless he can trace the trust property into its product and establish a proprietary interest in the proceeds. If the beneficiary is unable to trace the trust property into its proceeds, he still has a personal claim against the trustee, but his claim will be unsecured. The beneficiary's proprietary claims to the trust property or its traceable proceeds can be maintained against the wrongdoer and anyone who derives title from him except that a bona fide purchaser for value without notice of the breach of trust. The same rules apply even where there have been numerous successive transactions, so long as the tracing exercise is successful and no bona fide purchaser for value without notice has intervened.

On the same point I would also like to refer to the book on *Equity and Law of Trusts* (7th Ed) by Philip H Petit wherein at pp 505 and 506 it states as follows:

At p 505

In addition to a personal action for breach of trust, a beneficiary may have a proprietary remedy ...

And a proprietary remedy may be available in circumstances in which no personal action can be brought against the defendant. The question now to be discussed are how far a beneficiary can follow or trace property which has come into the hands of another, and, where tracing is possible, what rights and remedies he can claim ...

At p 506

At common law the legal owner of an asset who is deprived of the possession thereof has a right to follow it no matter in whose hands it may come, and notwithstanding that it may change its form, and so long as the means of identifying the asset in its original or converted form continue to exist...

In view of the foregoing, it is my finding that the third, fourth and fifth defendants' contention with regard to the application of the doctrines of 'dishonest assistance' and 'knowing receipt' to the plaintiffs' claim are unsustainable in the circumstances of this case.

THE APPEAL

[74] Before us, counsel for the first defendant agreed that the issues raised in these appeals are largely issues of fact. He pointed out that the case for the plaintiffs was based on the verbal statements alleged by PW2 to have been made by the deceased to him and on the ground that the first defendant has not paid for the said shares. He also pointed out that the learned judge found the plaintiffs' claim to have been proved on a balance of probabilities and that the first defendant was holding the said shares on trust for the deceased.

[75] Counsel for the first defendant then canvassed the following grounds of appeal:

(a) that the learned judge misdirected himself in law in holding that the alleged oral statement of the deceased to PW2 was made in the ordinary course of business, viz, he held that the alleged verbal statements were admissible under s 32(1)(b) of the Act;

(b) that the learned judge failed to apply the proper test in evaluating the evidence and erred in law and in fact in the conclusions of fact he came to;

(c) that the learned judge erred in finding that the plaintiffs have established on a balance of probabilities that:

(i) the deceased agreed to sell the said shares to the first defendant at the sum of RM1.2m;

(ii) the first defendant held the said shares on trust for the deceased pending settlement of the said purchase price; and

(d) that the learned judge erred in finding that the plaintiffs have adequately pleaded and proved the plaintiffs' claim against the defendants as constructive trustees.

[76] With regards to s 32(1)(b) of the Act counsel for the first defendant argued that the question that arises is whether these statements were made to PW2 in the ordinary course of business and, therefore, excepted from the hearsay rule. He then referred to the commentary in *Sarkar on Evidence* (15th Ed) 1999, Vol 1 at pp 684–686 which suggested that the terms 'ordinary course of business' has to be strictly construed. The following are excerpts from the commentary in *Sarkar on Evidence* referred to by counsel:

Pages 684–686:

> The phrase 'in the ordinary course of business' is apparently used to dictate the current routine of business which was usually followed by the person whose declaration it is sought to introduce. The rule laid down extended only to statements made during the course, not of any particular transaction of an exceptional kind, such as the execution of a deed a mortgage, but of business or professional employment in which the declarant was ordinarily or habitually engaged. The business referred to may be of a temporary character (*Sheonandan v Jeonandan* 13 CWN 71; *Gurucharan v Mafijuddin* 65 CLJ 603; [1938] AC 150).
>
> The particulars set out in s 32(2) though not exhaustive, may fairly be taken as indicating the nature of the statements made in the course of business. The expression 'course of business' is to be found also in ss 16, 34 and 114. The expression, in the ordinary course of business, in this clause, must mean in the

ordinary course of a professional avocation (*Ningawa v Bharmappa* 23 B 63), or the current routine of business which was usually followed by the person whose declaration it is sought to introduce (*Abdulla v Ma E Kin* 11 IC 854).

A statement made by a person since deceased, to his wife, that the defendants had asked him to lend them money and that he had lent them money on an 'on demand' note was inadmissible. But if it had been proved that he was in the habit of consulting his wife before giving loans, the letter would have been written in the ordinary course of business [*Abdulla v Ma E Kin* 11 IC 854].

[77] Counsel for the first defendant then argued that the communication by the deceased to PW2 was quite different in nature and cannot be regarded to have been made in the ordinary course of business as:

(a) the verbal statements of the deceased did not relate to the powers conferred to PW2 by the power of attorney which were quite specific in their nature; and

(b) that PW2, by his own evidence, was not at all concerned with the buy-out of the shares.

Counsel for the first defendant submitted that the learned judge was wrong in admitting the alleged verbal statements of the deceased. He then argued as follows:

(i) the finding of the learned judge that no payment was made by the first defendant for the said shares ignores the realities of the situation; that the number of shares agreed to be transferred to the first defendant was 1.2m was never in dispute;

(ii) whatever might have been the original arrangement reached between the first defendant and the deceased, the fact is that the deceased eventually transferred the said shares to the first defendant without payment; apart from the questionable allegations of PW2 regarding the deceased's verbal statements, there is no evidence to show that the first defendant had to pay for the shares; and

(iii) there is evidence to support the first defendant's claim that the deceased had agreed to and did transfer the said shares under an arrangement where the first defendant had agreed to be liable for the purchase price in excess of RM55m.

[78] Counsel then pointed out that the learned judge dismissed the contention that the said shares were not included in the list of assets of the deceased nor was any step taken to amend the list to include the said shares as an asset of deceased's estate. With regards to this issue he argued the following:

(a) that reliance on cases such as *Chua Chee Chor v Chua Kim Yong & Ors*

[1960] 26 MLJ 127, *Kwa Hock Kee & Anor v Kwa Kian Seng* [1985] 2 MLJ 283 and *Khoo Kay Hock v EJ Ketting & Ors* [1978] 2 MLJ 57 is misplaced;

(b) that if the administrators' claim is that the said shares belong to the deceased's estate, the plaintiffs would have included them in the list once the plaintiffs discovered that the first defendant was holding the said shares on trust; and

(c) that the plaintiffs have not been able to give an acceptable or reasonable explanation and thus did not know anything about the said shares nor did PW2.

[79] With regards to exh D59, counsel for the first defendant argued that the learned judge did not take into account the following:

(a) that PW5's (the first plaintiff) evidence on the alleged forgery was tendered in the second part of his witness statement;

(b) that the forgery allegation only surfaced when PW5 was called; prior to this there was no allegation that it was forged; and

(c) that PW5 did not tell any of his siblings of his forging his late father's signature until his turn to give evidence.

[80] We had on 17 June 2008 dismissed this appeal with costs and our reasons follows.

JUDGMENT OF THIS COURT

[81] The learned judge held that the oral statement of the deceased made to PW2 regarding the said shares was made in the ordinary course of business and hence admissible under s 32(1)(b) of the Act. In relation to this, counsel for the defendants argued that the learned judge misdirected himself in law in holding as such.

[82] We cannot see where the learned judge went wrong in ruling that the statement made by the deceased to PW2 relating to the management buy-out and the transfer of the said shares to the first defendant were statements made in the ordinary course of business. In *Sarkar on Law of Evidence* (16th Ed) with regards to s 32(1)(b) of the Indian Evidence Act, the learned author has this to say (at p 60):

> ... the second exception to the general rule of hearsay that derivative or second-hand proofs are not receivable in evidence. ... The ground of admission is that a statement or entry made in the ordinary course or routine of business or duty may be presumed to have been done from disinterested motive and may therefore be taken to be generally true.

> ... The only thing necessary for admissibility under the Act, is that the statements or entries must relate to a relevant fact.

and at p 801:

> The statements may be verbal or written. Oral statements, answering of course all other requisite conditions are equally receivable; ...

[83] The evidence adduced by the plaintiffs showed that PW2 was the deceased's good and trusted friend and confidante. PW2 was also the deceased's attorney under the power of attorney and was empowered to look after the deceased's personal and business affairs when he was away. We noted that cl 24 of the power of attorney (exh P77), wherein the deceased was the donor and PW2 the donee, reads:

> To attend and vote at the meetings of Kijal Resort Sdn Bhd or of any other company or companies or otherwise to act as my representative in respect of shares stock or debentures now held or which may hereafter be acquired in my name and generally to exercise for me in my name all rights and privileges and perform all duties which I may now or hereafter have as holder of such shares stock: or debentures or as otherwise being interested in any such company or companies.

Clause 24 of the power of attorney denote that the deceased has absolute faith and trust in PW2. The power of attorney was never revoked. This evidence would support the finding of the learned judge that the deceased consulted and kept PW2 informed on practically every aspect of his business dealings and personal affairs and had informed and discussed with PW2 matters relating to the management buy-out. We would think that the management buy-out and the transfer of the said shares did concern PW2 in his capacity as attorney and in his business with the deceased. There is evidence to show that the deceased even invited PW2 to join in the management buy-out but the latter declined as he did not have the funds to participate in the scheme. It cannot even be said that the management buy-out is a one-off transaction, as argued by counsel for the first defendant, as the whole exercise took a long period of time to complete and to take off.

[84] We would agree with the learned judge that the words 'in the ordinary course of business' appearing in s 32(1)(b) of the Act should be given 'a broad and liberal connotation'. With regards to this, the learned judge referred to *Devi Singh v Phulma* AIR 1961 HP 10. In that case, in dealing with the words 'in the ordinary course of business' appearing in s 32(2) of the Indian Evidence Act, CB Capoor JC said (at pp 12–13):

> The passing of information about the important and chief events in the history of a family by the male members of the family to the women folk or by the elders to the youngers should be held to be in the ordinary course of business and those

words should be given a broad and liberal connotation. To hold otherwise would result in the shutting out of proof of facts on which on account of lapse of time direct evidence is not available.

In the case at *Abdulla v Ma E Kin* 11 Ind Cas 854 (LB), a question arose as to whether a statement made by a person since deceased, in a letter to his wife that the defendants had asked him to lend them money and that he had lent them money on an 'on demand' note was admissible or not. The question was answered in the negative as there was no evidence indicating that the husband was in the habit of consulting his wife before giving loans. It was, however, observed that if it had been proved that he was in the habit of consulting his wife before giving loans, the letter would have been written in the ordinary course of business.

In the case of *Ramamurthi v Subba Rao* AIR 1937 Mad 19, a letter was written by a party to his wife making reference to a settlement and asking her to do certain acts to forward the settlement, such as by telling his uncle that he would execute a mortgage deed in his favour, was filed to prove family settlement and it was held by Horwill J that the letter was relevant under s 32(2) of the Indian Evidence Act. In the course of his judgment, it was also observed by him that the words 'in the course of business' as used in s 32(2) of the Indian Evidence Act mean the way the business (which may be of a purely private or even trivial nature) is conducted and have no connection with the course of business suggesting a series of acts of business.

The disruption of the status of a joint family is, in my opinion, a matter with which the ladies of the family not only keep themselves in touch, but usually, if not invariably, have also a say thereon and it might well be presumed that if a lady of the family does not participate in the actual deliberations, she is kept fully conversant with them by her nearest male relative. Thus, an important event in the history of a family communicated by either the husband to his wife or by an elder to a younger even in the ordinary course of conversation at a time when there is no controversy about it may well be held to be a statement made in the ordinary course of business.

[85] In the instant appeal, the learned judge found PW2 to be a credible and reliable witness and that he did not have any pecuniary interest in the outcome of the present suit. We see no reason to brush aside this finding. The learned judge accepted the evidence of PW2 which can be summarised as follows:

(a) that the deceased informed him that the first defendant was to pay a sum of RM1.2m as consideration for the said shares (then amounting to 1.2m shares) transferred to the first defendant by the deceased;

(b) that it was agreed between the deceased and the first defendant that until the latter pays the sum of RM1.2m, the beneficial ownership of the said shares shall remain and vest with the deceased; and

(c) the first defendant never paid for the shares.

[86] We are of the view that there was corroboration of PW2's evidence based upon the facts and circumstances of the instant appeal. It is the plaintiffs' case that after the death of the deceased, the first defendant was in communication with them and had on several occasions made express admissions that he has not paid the purchase price for the said shares. With regards to this, it would be appropriate at this stage to recapitulate the first defendant's case as pleaded in relation to the said shares, namely, in para 9 of his statement of defence, he contended that it was agreed between the deceased and him that in the management buy-out, any shares personally allotted to or personally acquired by the deceased were to be divided equally between the deceased and him as consideration for arranging the participation of BRUG in the transaction. This defence, in our view, suggest that the first defendant canvassed for a form of a commission or a payment in kind from the deceased for arranging BRUG's participation in the management buy-out and that the transfer of the said shares (then amounting to 1.2m shares) was his share which in turn would denote that the deceased received 2.4m free shares from BRUG and further in turn would denote that the first defendants never paid the deceased for the said shares.

[87] In the course of giving evidence at the trial, the first defendant claimed as follows:

(a) that he was entitled to the said shares for free;

(b) that he negotiated with BRUG for the payment of RM5m from BRUG to the deceased and that he was entitled to half of that sum, ie, RM2.5m;

(c) that his entitlement to the said shares was due to his agreement with the deceased (exh D59) that he (the first defendant) will pay for any acquisition price in excess of RM55m.

[88] The learned judge did not accept the aforesaid claims and at the end of the day found that the first defendant was not a credible witness. He found him to be 'evasive and gave contradictory evidence'. We have reproduced earlier at length the relevant parts of the judgment of the learned judge with regards to this besides the facts and the evidence adduced at the trial and we found there is nothing which would convince us that the learned judge was wrong in his conclusion. The following would be relevant:

(a) the first defendant was not a member of the local management team of the H&C subsidiaries when the management buy-out was proposed and subsequently effected;

(b) the final acquisition of the H&C subsidiaries was agreed at RM52.5m and hence BRUG's obligation, if at all, to pay the deceased would be reduced to RM2.5m only;

(c) exhibit D59, the so-called 'understanding' dated 1 July 1990 made between the deceased and the first defendant, especially para (c) of the same, viz, that the first defendant undertake to pay any excess above the RM55m, ie, the acquisition price of RM50m plus RM5m contingency fund has no bearing at all upon the first defendant's case; exh D59 is dated 1 July 1990 whereas the agreement wherein Jantoco agreed to purchase all the shares of the H&C subsidiaries from Harrison & Crosfield Plc for the sum of RM52.5m is dated 22 March 1990; we are of the view that the said para (c) cannot fit in at all under of the circumstances and cannot have any effect and hence would lend support to the plaintiffs' case that PW5 (the first plaintiff) 'imitated' the signature of the deceased in exh D59 which was prepared by the first and third defendants and that they requested him to 'imitate' the deceased's signature thereon; thus, we are of the view that exh D 59 substantiated the learned judge's view that the first defendant is not a credible witness;

(d) paragraph (a) of exh D59 which this dated 1 July 1990 suggest that the deceased requested the first defendant to negotiate with BRUG and ask for a contingency fund of RM5m to be credited to the deceased's account; if that was the 'understanding', we cannot see why the deceased would subsequently on 3 September 1990 send a handwritten note (exh P3) to the first defendant wherein he informed that BRUG had offered him RM10m in the form of free shares but when the acquisition price was increased to RM50m, the free shares were reduced to RM5m; with regards to this the learned judge found that exh P3 showed that the first defendant was not involved in the negotiations with BRUG; we are of the same view, viz, if the deceased did ask the first defendant to negotiate with BRUG for a contingency fund of RM5m, there was no necessity for the deceased to write exh P3 to explain to the first defendant what had transpired between him (the deceased) and BRUG in the negotiations for the contingency fund and furthermore, it had already been agreed by then that the acquisition price for purchase of the H&C subsidiaries was RM52.5m;

(e) the learned judge found that the first defendant never paid any money to the deceased for the said shares (then amounting to 1.2m shares); in the course of this appeal, counsel for the first defendant conceded that the first defendant's did not pay to the deceased the said purchase price for the said shares.

[89] Thus, it is not disputed that the said shares (then amounting to 1.2m shares) were transferred by the deceased to the first defendant but the first defendant never paid for the shares. The learned judge found that the first defendant's claim that the said shares were given to him for free and that it was his share for having arranged the participation of BRUG in the

management buy-out 'is not supported or borne out by the contemporaneous documents and the objective facts of this case'. The learned judge also accepted the evidence of PW2 of the fact that he was told by the deceased that the first defendant was to pay a sum of RM1.2m to the deceased as consideration for the said shares transferred by the deceased to the first defendant and that it was agreed between the deceased and the first defendant that until the sum is paid, the beneficial ownership of the said shares 'shall remain with and vest' with the deceased.

[90] The next question arising is whether the learned judge was correct in holding that the first defendant is a constructive trustee of the said shares. Counsel for the third, fourth and fifth defendants has also argued that the plaintiffs' claim against them as constructive trustees should be dismissed as the plaintiffs have failed to plead this. With regards to this, the learned judge was of the view that the essential ingredients to sustain an action against the first and the third, fourth and fifth defendants as constructive trustees for the shares that were transferred to them have been sufficiently pleaded. We have referred to that part of his judgment earlier in this judgment. We agree with his views on this issue. We would also like to add that a case on point is in *Re Vandervell's Trusts (No 2), White and Ors v Vandervell Trustees Ltd* [1974] Ch 269, a Court of Appeal decision where it was held that where a party has set out in his pleadings not only the material facts on which he seeks to rely, but also the legal consequences which he seeks to draw from those facts, that party is not precluded at the hearing from seeking to draw different legal consequences from the facts pleaded. In his judgment, Lord Denning MR said (at pp 321–322):

> Mr Balcombe for the executors stressed that the points taken by Mr Mills were not covered by the pleadings. He said time and again: 'This way of putting the case was not pleaded.' 'No such trust was pleaded'. And so forth. The more he argued, the more technical he became. I began to think we were back in the bad old days before the Common Law Procedure Acts 1852 and 1854, when pleadings had to state the legal result; and a case could be lost by the omission of a single averment (see *Bullen and Leake's Precedents of Pleadings* (3rd Ed, 1868), at p 147. All that has been long swept away. It is sufficient for the pleader to state the material facts. He need not state the legal result. If, for convenience, he does so, he is not bound by, or limited to, what he has stated. He can present, in argument, any legal consequence of which the facts permits. The pleadings in this case contained all the material facts. It does appear Mr Mills put the case before us differently from the way in which it was put before the judge: but this did not entail any difference in the facts, only a difference in stating the legal consequences. So it was quite open to him.

In his judgment, Lawton LJ said (at p 324):

> As to the pleading point, it is pertinent to bear in mind what, under the Rules of the Supreme Court, should be put into pleadings. Order 18 r 7 provides as follows:

> Subject to the provisions of this rule and rr 7A, 10, 11 and 12 (none of which are relevant in this case), 'every pleading must contain, and contain only, a statement in summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be ... and the statement must be as brief as the nature of the case admits.'

It follows, so it seems to me, that the question for decision in this case is whether the material facts have been set out in the pleadings, not whether Mr Mills made submissions before this court as to legal consequences which had not been set out. Much the same kind of point was taken before this court in *Lever Bros Ltd v Bell* [1931] 1 KB 557. When dealing with it Scrutton LJ said. At pp 582–583:

> In my opinion the practice of the courts has been to consider and deal with the legal result of pleaded facts, though the particular legal result alleged is not stated in the pleadings, except in cases where to ascertain the validity of the legal result claimed would require the investigation of new and disputed facts which have not been investigated at the trial.

These comments are apt to fit this case, which is not one within the exception. In my judgment the pleadings did set out all the material facts sufficient to justify the legal results which Lord Denning MR has adjudged follow and with which I agree.

[91] A constructive trust is simply a relationship created by equity in the interest of conscience. According to *Snell's Equity* (26th Ed) (at p 201), a constructive trust is 'a trust which is imposed by equity in order to satisfy the demands of justice and good conscience, without reference to any express or presumed intention of the parties'. In *The Law of Trusts* by JG Riddall (3rd Ed) (at p 359) the learned author's views are as follows:

> The constructive trust is a remedial device that is employed to correct unjust enrichment. It has the effect of taking title to property from one person whose title unjustly enriches him, and transferring it to another who has been unjustly deprived of it...

[92] On constructive trusts, *Halsbury's Laws of England* (4th Ed – Reissue) Vol 48 at pp 301–306 reads as follows:

> 585 *Nature of constructive trust*. A constructive trust attaches by law to specific property which is neither expressly subject to any trusts nor subject to a resulting trust but which is held by a person in circumstances where it would be inequitable to allow him to assert full beneficial ownership of the property. Such a person will often hold other property in a fiduciary capacity and it will be by virtue of his ownership of or dealings with that fiduciary property that he acquired the specific property subject to the constructive trust. A stranger who receives property in circumstances where he has actual or constructive

notice that it is trust property being transferred to him in breach of trust will, however, also be a constructive trustee of that property.

> A person who holds property on a constructive trust is a constructive trustee in respect of it. He cannot claim for himself any increase in value of the property or any profits earned by it. If he becomes bankrupt, the property is not available for his general creditors but for the beneficiaries in whose favour the constructive trust subsists.

586 *Flexibility of constructive trust principles to prevent fraudulent or unconscionable conduct*. Although there are two clear categories of constructive trusts, that is, those involving profits made by fiduciaries and those created by the intermeddling of strangers, the categories of constructive trusteeship are not closed.

590 *Accretions to trust property*. Where an accretion of any kind comes to property held in trust or in a fiduciary capacity, the accretion cannot be retained by the holder of the property but forms part of the capital of the trust property for the benefit of the person or object beneficially interested in it.

[93] In *Hussey v Palmer* [1972] 3 All ER 744, as to the meaning of constructive trusts, Lord Denning MR said (at p 747):

> Although the plaintiff alleged that there was a resulting trust, I should have thought that the trust in this case, if there was one, was more in the nature of a constructive trust; but this is more a matter of words than anything else. The two run together. By whatever name it is described, it is a trust imposed by law whenever justice and good conscience require it. It is a liberal process, founded on large principles of equity, to be applied in cases where the defendant cannot conscientiously keep the property for himself alone, but ought to allow another to have the property or a share in it. The trust may arise at the outset when the property is acquired, or later on, as the circumstances may require. It is an equitable remedy by which the court can enable an aggrieved party to obtain restitution. It is comparable to the legal remedy of money had and received which, as Lord Mansfield said, is very beneficial and, therefore, much encouraged. Thus we have repeatedly held that, when one person contributes towards the purchase price of a house, the owner holds it on a constructive trust for him, proportionate to his contribution, even though there is no agreement between them, and no declaration of trust to be found, and no evidence of any intention to create a trust. Instances are numerous where a wife has contributed money to the initial purchase of a house or property; or later on to the payment of mortgage instalments; or has helped in a business: see *Falconer v Falconer* [1970] 3 All ER 449; [1970] 1 WLR 1333), *Heseltine v Heseltine* [1971] 1 All ER 952; [1971] 1 WLR 342) and *Re Cummins (decd), Cummins v Thompson* (1971) 3 All ER 78; [1972] Ch 62. Similarly, when a mistress has contributed money, or money's worth, to the building of a house: *Cooke v Head* [1972] 2 All ER 38; [1972] 1 WLR 518). Very recently a purchaser has been held to hold on trust for an occupier: *Binions v Evans*

A [1972] 2 All ER 70; [1972] Ch 359. In all those cases it would have been quite inequitable for the legal owner to take the property for himself and exclude the other from it. So the law imputed or imposed a trust for his or her benefit.

B **[94]** In the instant appeals, we are of the view that there will be unjust enrichment if the defendants were allowed to keep the said shares. The learned judge was right in imputing or imposing a constructive trust whereby the first defendant held the said shares on trust for the deceased's estate. Having regard to his conduct, and in not being able to prove his claim that the said shares were given gratuitously to him by the deceased and his C conduct in transferring the 4m shares to the third defendant notwithstanding his undertaking given to the court, it would be inequitable to allow him to deny the deceased's estate of the said shares. The relevant principles of trust law have been laid down in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 by Lord Browne-Wilkinson at D p 705; he said:

(i) Equity operates on the conscience of the owner of the legal interest. In the case of a trust, the conscience of the legal owner requires him E to carry out the purposes for which the property was vested in him (express or implied trust) or which the law imposes on him by reason of his unconscionable conduct (constructive trust).

(ii) Since the equitable jurisdiction to enforce trusts depends upon the conscience of the holder of the legal interest being affected, he cannot F be a trustee of the property if and so long as he is ignorant of the facts alleged to affect his conscience, ie until he is aware that he is intended to hold the property for the benefit of others in the case of an express or implied trust, or, in the case of a constructive trust, of the factors which are alleged to affect his conscience.

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(iii) In order to establish a trust there must be identifiable trust property. The only apparent exception to this rule is a constructive trust imposed on a person who dishonestly assists in a breach of trust who may come under fiduciary duties even if he does not receive H identifiable trust property.

(iv) Once a trust is established, as from the date of its establishment the beneficiary has, in equity, a proprietary interest in the trust property, which proprietary interest will be enforceable in equity against any subsequent holder of the property (whether the original property or I substituted property into which it can be traced) other than a purchaser for value of the legal interest without notice.

These propositions are fundamental to the law of trusts and I would have thought uncontroversial.

[95] From the circumstances, the learned judge was right in finding that there had been an arrangement between the deceased and the first defendant whereby the said shares were transferred to the first defendant without payment until such time the first defendant was financially capable and pending payment, that the beneficial ownership of the said shares remain with the deceased, viz, that it will be held on trust for the deceased. This arrangement and the first defendant's subsequent conduct in evading the issue when confronted by the plaintiffs was not merely an unenforceable declaration of trust but an arrangement which the law could give effect. As the legal owner of the said shares, being the registered shareholder, the first defendant is bound to hold the property on trust for the deceased. This trust does not need to be in writing.

[96] The deceased treated the first defendant as an acquaintance and a good friend. They have known each other for several years. The deceased seems to have trusted him. The first defendant has now conceded during the course of this appeal that he never paid for the said shares. In view of his conduct it would be most inequitable for the first defendant to deny the deceased's estate of the said shares. The law will impute or impose a constructive trust by which he held the said shares and also the bonus issue and any other accretions relating to the said shares on trust for the deceased's estate. The first defendant together with the third, fourth and fifth defendants have now to transfer the said shares (now amounting to 4,580,600 shares) together with all rights, title, interest and benefits, including all moneys, dividend, bonus issue or other distributions, arising out of, or accrued under, the said shares which were acquired by them as the registered holder of the said shares to the deceased's estate.

[97] The first defendant has placed himself in a special position that was of a fiduciary nature. He conceded he never paid for the shares. He obtained the opportunity to continue owning the shares without regard to the fact that he never paid the said purchase price, ie, RM1.2m to the deceased. An arrangement of this character to get the deceased to transfer the said shares to him without paying for it immediately and to defer payment give rise to relationship of a fiduciary character or trust, in favour of the deceased. The transaction involved nothing more than a transfer of the said shares to the first defendant and the fact is that the beneficial interest never left the deceased and simply remained where it had previously been. Thus it is a constructive trust. The first defendant was registered as the owner of the said shares but pending the payment of RM1.2m it was held on an oral trust for the deceased. Except that the first defendant held the said shares on the register of members of HHMB, the transfer and registration made no difference as between the deceased and the first defendant. The deceased and now his estate is beneficially entitled to the said shares (now amounting to

4,580,600 shares) and could at any time call for the transfer of the said shares and be registered once again as its owner.

[98] The learned judge, based on the evidence before him, found that the transfer of the said shares was not intended to operate as a gift. There was clearly no intention of a gift. The beneficial interest never left the deceased with the result that there was no disposition of that interest in the said shares. Absence of writing does not preclude the deceased as transferor from asserting his entitlement in equity. It is unconscionable after the failure to make payment for the said shares for the first defendant to assert his rights as registered owner of the said shares. He failed to fulfill that condition. A failure of consideration occurred as there has been a failure of performance by the first defendant of his obligation under an arrangement which was initially binding. Under the circumstances the learned judge was correct by way of remedy to impose a constructive trust on the first defendant who knowingly retains property of which the deceased has been unjustly deprived of. The learned judge found that the deceased agreed to sell the said shares to the first defendant at the sum of RM1.2m and that the first defendant held the said shares on trust for the deceased pending settlement of the purchase price. Thus, the constructive trust have been perceived to have the function of reversing unjust enrichment.

[99] We find no reason to disturb the findings of the learned judge on questions of fact. The first defendant has failed to show that the said shares were transferred to him as some sort of commission or payment in kind for making the arrangements to get BRUG to participate in the management buy-out. In *Tay Kheng Hong v Heap Moh Steamship Co Ltd* [1964] MLJ 87, Lord Guest, in delivering the judgment of the Privy Council said (at p 92):

> There is a heavy onus on a party who seeks to displace the conclusion formed by the trial Judge on questions of fact. The principles upon which an appellate Court should act in reviewing the decision of a judge of first instance were stated by Lord Thankerton in *Watt or Thomas v Thomas* [1947] AC 484, at pp 487– 488; [1947] 1 All ER 582 at p 487.
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> (i) Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion;
>
> (ii) The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence;

(iii) The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.

Later His Lordship quoted with approval a passage from the speech of Lord Shaw in *Clarke v Edinburgh & District Tramways Co Ltd* [1919] SC 35,at p 37(HL)).

In my opinion, the duty of an appellate court in those circumstances is for each judge of it to put to himself, as I now do in this case, the question, Am I — who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case — in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.

[100] Another case on point as to whether an appeal court can interfere with the finding of the trial judge is *Samar binte Mansor v Mustafa Kamal Ariffin* [1974] 2 MLJ 71 where Raja Azlan Shah FJ (as His Highness then was) said (at p 72):

It is axiomatic that a finding of negligence though involving matters of inference, is properly regarded as a finding of fact. For an appellant to succeed in an appeal against a finding of fact made by a single judge, he must convince the appellate court that the learned judge was wrong in his conclusion. That the appeal may be by way of re-hearing does not alter the situation. A hearing is not, however, a retrial of the issues. The question is not whether an appellate court can substitute its view of the facts which of course it is empowered to do so, but whether it should do so. However much an appellate court may be in an equal position with the trial judge as to the drawing of inferences, it ought not to reverse the finding of fact unless it is convinced that it is wrong. It is not whether the inferences are right but whether an appellate court is convinced that they are wrong. If that finding is a view reasonably open on the evidence, it is not enough to warrant its reversal just because an appellate court would have come to a different view. Merely differing views do not establish that either view is wrong, but in balancing these two views an appellate court should give due weight to the nature of the fact as found by the trial judge. Thus *Benmax v Austin Motor Co Ltd* [1955] AC 370, at p 376 is authority for the proposition that an appellate court is not bound by inferences of fact drawn by the trial judge which did not turn on the credibility of witnesses, seen and heard by him, that it may not examine the matter afresh.

In *Mersey Docks and Harbour Board v Procter* [1923] AC 253, at pp 258–259 Vicount Cave LC said:

The duty of a court hearing an appeal from the decision of a judge without a jury was clearly defined by Sir Nathaniel Lindley MR in *Coghlan v Cumberland* [1898] 1 Ch 704 and by Lord Halsbury in *Montgomerie & Co v Wallace-James*

A [1904] AC 73 and is no longer in doubt. The procedure on an appeal from a judge sitting without a jury is not governed by the rules applicable to a motion for a new trial after a verdict of a jury. In such a case it is the duty of the Court of Appeal to make up its own mind, not disregarding the judgment appealed from and giving special weight to that judgment in cases where the credibility of witnesses comes into question, but with full liberty to draw its own inference from the facts proved or admitted, and to decide accordingly. In the present case there is no question of the credibility of witnesses. The material facts, so far as they are known, are undisputed; and the Court of Appeal was at liberty, and indeed was bound, to draw its own inference from them.

[101] Another argument raised by counsel for the first defendant was that the deceased passed away on 27 October 1993 but when the plaintiffs applied for letters of administration of the deceased's estate, they did not include the sum of RM1.2m purportedly due and payable by the first defendant in the list of assets. Counsel argued the fact that the said amount was not included in the list of assets even at the date of the action in the High Court showed that the plaintiffs were not informed by PW2 of the alleged verbal statement until very late. Further, PW2 never made any demand for the said shares or the said purchase price from the first defendant although he was purportedly the duly appointed attorney for the deceased; he did not even take such steps after the demise of the deceased.

[102] We are of the view that what has been canvassed above is a non-issue. Assets set out in the schedule forming part of a grant of letters of administration does prove a deceased's title to property scheduled therein. A supplementary schedule can always be attached upon discovery of any item not scheduled therein. With regards to this issue, we would refer to *Khoo Kay Hock v EJ Ketting & Ors* [1978] 2 MLJ 57. The facts there showed that the plaintiffs had taken out a writ against the defendants claiming damages for negligently causing the death of the deceased. At the hearing the defendants contended, inter alia, that the plaintiff has no title to institute the action as the schedule of assets annexed to the grant of letters of administration did not include the claim or claims. On appeal, it was held that the schedule of property to the grant of letters of administration did not in law affect the title of the personal representative of a deceased person to institute legal proceedings and the trial judge was correct in deciding that the appellants be allowed to file a corrective affidavit. Raja Azlan Shah FJ (as His Highness then was) said (at p 58):

> We feel that the objection raised on behalf of the defendants has no merit. We therefore agree with the decision of the learned trial judge that the plaintiff be allowed to file a corrective affidavit in proper form. The schedule of property to the grant of letters of administration does not in law affect the title of the personal representative of a deceased person to institute legal proceedings. It does not affect

him one way or another. It is only a description of the property to be administered and not a description of his status to sue. The indorsement on the writ that the plaintiff is bringing the action in a representative capacity as administrator is the crucial matter. See O 3 r 4 of the Rules of the Supreme Court. See also *Bowler v John & Klowlem & Co Ltd* [1954] 3 All ER 556.

The object of the law relating to the collection of estate duty is a fiscal measure enacted to secure revenue for the state on certain classes of property on death. It is not enacted to arm a litigant with a weapon of technicality to meet the case of his opponent. The stringent provisions of this law are conceived in the interest of revenue and once that object is achieved according to law, the party founding his claim on the schedule will not be defeated on the ground of the initial defect in the said schedule.

[103] In *Chua Chee Chor v Chua Kim Yong & Ors* [1960] MLJ 127, which was cited with approval in *Khoo Kay Hock v EJ Ketting & Ors*, one of the questions before the court was whether grant of letters of administration is conclusive evidence of ownership of assets set out in the schedule forming part of grant. It was held that when the court grants letters of administration, it does not go into questions of title as to the assets alleged to be the property of the deceased at the time of his death and that such a grant is not, by virtue of s 41(2)(d) of the Evidence Ordinance, conclusive proof that the property in the schedule to the grant was owned by deceased at the time of his death. Smith J said (at p 130):

In the same manner it appears to me that when the court grants letters of administration it does not go into questions of title as to the assets disclosed in the affidavit of the petitioner any more than it goes into the right of a testator to the property of which he purports to dispose in his will.

The principal object of the schedule to the grant of letters of administration appears to be for the purpose of ensuring that correct security is given. It does not prove the deceased's title to the property scheduled.

[104] For the above reasons we had on 17 June 2008 dismissed both appeals with costs. All orders of the High Court were affirmed. We also ordered that the deposit in both appeals be remitted to the plaintiffs to account of taxed costs.

[105] We are of the view that the learned judge did not err in law nor fact in allowing the plaintiffs' claim. We find that the learned judge has made findings of fact based on the evidence adduced before him and as such find no reason to disturb his findings.

Enclosure 32a

[106] At the outset of the hearing of these appeals, counsel for the first

A defendant requested that we hear his notice of motion (encl 32a) which is an application for an order that leave be given to adduce further evidence, namely, of a criminal charge preferred against the first plaintiff, Tengku Mohd Saad @ Tengku Arifaad bin Tunku Mansur (PW5). The application was based on the ground that pursuant to a police report lodged by the first defendant B on 17 December 2003 against the first plaintiff at the Satok Police Station, Kuching, Sarawak, a charge was preferred against the first plaintiff under s 193 of the Penal Code; s 193 reads:

> Whoever intentionally gives false evidence in any stage of a judicial proceeding, or C fabricates false evidence for the purpose of being used in any stage of a judicial proceeding, shall be punished with imprisonment for a term which may extend to seven years, and shall also be liable to fine; ...

The first defendant argued that this further evidence would have had or would have been likely to have a determining influence upon the decision of D the High Court.

[107] In his affidavit in support of the application, the first defendant stated, inter alia, as follows:

E

4. I respectfully state that at the trial of the action in the High Court, the first Respondent gave evidence on behalf of the Respondents as PW5. In his evidence the first Respondent alleged that he forged the signature of the late Tunku Mansur, deceased in exh D59 at my wife F and my instigation. A copy of D59 is now produced and marked as 'A'.

5. I lodged a police report against the said first respondent for perjury as his said evidence was false. A copy of the police report is now produced and shown to me marked as 'B'.

G

6. I verily believe that the learned High Court judge in his judgment has made certain findings in respect of exh D59 namely that the late Tunku Mansur could not have possibly prepared and signed D59 or agreed to the terms therein (p 49 of judgment).

H

7. The learned judge appeared to have accepted PW5's evidence that PW5 forged the signature of his late father. (pp 52–55 of judgment).

8. I respectfully state and verily believe that PW5 was subsequently charged under s 193 of the Penal Code at the Kuala Lumpur I Magistrate's Court. There is now produced and shown to me a copy of the charge sheet marked as 'C'.

9. I respectfully state that this evidence was available only after the conclusion of the trial and after judgment in the High Court. I verily believe that this evidence would have had or would have been likely

to have a determining influence upon the decision of the High Court, in particular of the validity of D59.

[108] The police report by the first defendant against PW5 was lodged on 17 December 2003 in Satok, Kuching, Sarawak. The notes of evidence of the learned judge showed that PW5 testified in court on 8 December 2003. In opposing the application, the fourth plaintiff's affidavit in reply on behalf of the plaintiffs pointed out the following:

(a) prior to the completion of the trial before the High Court, the plaintiffs filed an application for, inter alia, an order that the High Court appoint a document examiner from the chemistry department to examine exh D59 to ascertain whether the first plaintiff (PW5) had forged the signature of the deceased in the same;

(b) despite attempting to rely of exh D59 as evidence to support their defence, the first defendant and also the third, fourth and fifth defendants have elected to strenuously oppose the application;

(c) despite that the alleged offence under s 193 of the Penal Code was allegedly committed in the Kuala Lumpur High Court, the first defendant chose to file the police report in Satok, Kuching, Sarawak; any investigation will be under the the purview of the deputy public prosecutor based in Kuching, Sarawak;

(d) he verily believe that the lodging of the police report in Satok, Kuching, Sarawak whilst the alleged offence was committed in the High Court, Sultan Abdul Samad Building in Kuala Lumpur, is against the norm;

(e) he and the first plaintiff were contacted by police officers from Sarawak to assist with the investigation and they have provided all necessary assistance;

(f) the first plaintiff had on 5 October 2004 also lodged a police report with the Dang Wangi police station, Kuala Lumpur, ie, the police district wherein the alleged offence was allegedly committed against the first and third defendants for giving false statement evidence in court; he has no knowledge of the outcome of the police investigation;

(g) he verily believe that the purported new evidence that the first defendant is attempting to adduce is not 'new evidence' as prescribed in law;

(h) the first plaintiff was charged in the magistrates' court on 5 July 2006 and the third, fourth and fifth defendants consequently filed in a supplementary record of appeal without any leave of this court on 18 July 2006 enclosing the relevant newspaper cuttings;

(i) he verily believe that the first defendant is attempting by this application to smear the first plaintiff's name before this court.

[109] We had unanimously dismissed encl 32a with costs. From our records, no appeal has been filed against our decision. We dismissed the application for the following reasons:

(a) the first plaintiff (PW5) testified in the court below on 8 December 2003 with regards to his claim that the first and third defendants requested him to imitate the deceased's signature on exh D59;

(b) it being a defence exhibit, we cannot fathom why the first defendant and also the third, fourth and fifth defendants elected to strenuously oppose the plaintiffs' application filed on 18 April 2004 for an order that the court appoint a document examiner from the chemistry department to examine exh D59 to ascertain whether the first plaintiff (PW5) had forged the signature of the deceased in the same, notwithstanding that the defendants were relying on exh D59 as evidence to support their defence; we would have thought that the opinion of a document examiner would throw a better light on whether it was the signature of the deceased that appeared in exh D59 or otherwise;

(c) section 69(1) of the Courts of Judicature Act 1964 (CJA) provides that this court has a discretionary power to receive further evidence and s 69(3) reads:

> Upon appeals from a judgment, after trial or hearing of any cause or matter upon the merits, the further evidence, save as to matters subsequent as aforesaid, shall be admitted on special grounds only, and not without leave of the Court of Appeal.

(d) Rule 7 of the Rules of the Court of Appeal 1994 ('the Rules') reads:

> (1) ...
>
> (2) ...
>
> (3) Upon appeals from a judgement, after trial or hearing of any cause or matter upon the merits, such further evidence, save as to matters subsequent aforesaid, shall be admitted on special grounds only, and not without leave of the Court.
>
> (3A) At the hearing of the appeal further evidence shall not be admitted unless the Court is satisfied that —

(a) at the hearing before the High Court or the subordinate court, as the case may be, the new evidence was not available to the party seeking to use it, or that reasonable diligence would not have made it so available; and

(b) the new evidence, if true, would have had or would have been likely to have had a determining influence upon the decision of the High Court or the subordinate court, as the case may be.

(e) the fact that the first plaintiff (PW5) was charged in the magistrate court for an offence under s 193 of the Penal Code has no bearing upon the decision of the learned judge as up the time we heard this application nothing has come out of the criminal proceedings neither have the matter been concluded or disposed off; it is trite that a charge preferred against an accused is not evidence that he has committed the crime; and

(f) further, from our reading, the learned judge did not give much value to exh D59 for several reasons which have been reproduced and discussed earlier in this judgment and evidence of such a charge cannot at all under the circumstances of this case would have had or would have been likely to have had a determining influence upon the decision that he made in the instant appeals.

Thus we found no special grounds for us to grant leave and on 26 September 2006 had dismissed encl 32a with costs.

Enclosures 42a and 38a

[110] At the end of the hearing of these appeals, we had reserved our judgment. Prior to delivering our judgment, we were informed that the first and the third, fourth and fifth defendants had filed in further applications (encll 42a and 38a) for leave to be granted to adduce further evidence, namely, that Gabriel Patrick O'Holohan (PW2) had, in Civil Suit No MT1–22–06 of 1994 in the Alor Setar High Court between Foyin Development Sdn Bhd as plaintiff and Tunku Yaacob Holdings Sdn Bhd and Cayman Development (SP) Sdn Bhd as defendants, gave evidence which is contradictory to what he had testified in the instant case under appeal and that this new evidence would have had a material effect on these appeals as the learned judge in these appeals had 'relied substantially' on the evidence of PW2 in coming to his decision.

[111] At the outset counsel for the first defendant argued that as his application (encl 42a) was made pursuant to r 7(2) of the Rules, leave of this court is not required. Rule 7(2) of the Rules read:

> Such further evidence may be given without leave on interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought.

Counsel also referred to s 69(2) of the CJA which reads:

> The further evidence may be given without leave on interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought.

Counsel then said although no leave is required under s 69(2) of the Courts of Judicature Act ('CJA') and r 7(2) of the Rules, it is felt that a formal application should nevertheless be made to the judges of this court which heard these appeals 'so that they may be able to consider the alleged inconsistencies in O'Halahan's evidence when deliberating on the appeal'.

[112] We pointed out to counsel that the applications were clearly worded and that they were both in the nature of applications for leave. He agreed and then requested the court to hear the applications 'as it is'. He then ventilated the following:

(a) the learned judge held that the evidence of PW2 of the alleged conversation the deceased had with him was made in the course of business and the learned judge relied substantially on his evidence;

(b) in his evidence in this case under appeal, PW2 gave the impression that the deceased was very jovial and full of energy when he saw him in the hospital on 26 October 1992 whereas according to his evidence in the proceedings in the Alor Setar High Court, that was not at all the state of health of the deceased when he saw him, which was not on 26 October 1993 but the next day and when the deceased was just about to pass away;

(c) further, PW2 in the proceedings in the Alor Setar High Court then sought to excuse the inconsistencies in his evidence by saying he could not remember;

(d) the discrepancies in PW2's evidence of the conversation he allegedly had with the deceased 'is too great and cannot be glossed over whatever his excuse' and to do so 'would cause an injustice to the appellants';

(e) 'the nature of the discrepancies is such that this fresh evidence sought to be adduced would have or would have been likely to have had a determining influence upon the decision of the High Court judge' and that 'they should be carefully looked at by this court when making its decision on the appeal'.

[113] On the other hand, counsel for the third, fourth and fifth defendants informed us that his application (encl 38a) was for leave. He then argued that PW2's evidence in the Alor Setar High Court was materially inconsistent with his evidence in this instant appeals and that the inconsistency also arose from PW2's evidence on the events which transpired before the deceased passed away in Perth.

[114] In the course of their arguments, both counsel referred to certain excerpts of the notes of proceedings as recorded by the learned judge in the Alor Setar High Court commencing 25 May 2006 with regards to the testimony of PW2 whilst under cross-examination. They highlighted the following (as underlined in red in their applications):

> (Peguam: How would you describe Tungku's condition on 26.10.93?) He was not strong at all and he had a relapse. On 26. 10. 1993 Tengku Mansur was in the ICU Ward at that time.
>
> I cannot remember what time I arrived at Perth on 26.10.93. From Perth airport I went to the hotel but I can't remember the name.
>
> The next morning I went to the hospital to visit Tungku Mansur. I can't remember whether I saw Tungku Mansur at the Hospital on 26.10.93. I arrived at the Hospital at 8.00 am on 27. 10. 93. I can't remember how long I waited before I got to see Tungku Mansur.
>
> (Peguam: Tell us what you and Tungku Mansur spoke on 27.10.93). Tungku Mansur asked me about the work on the Plaza. I told him that I was not very happy because there were no work going and there was no progress to the Defendant 1. He was very sick at that time and I did not want to tell him too much bad news at that time.
>
> (Peguam: Did Tungku Mansur say anything else to you and did you say anything else to him on the 27.10.93). Tungku said I was to go back to Malaysia and to cancel the contract or whatever it was with the plaintiff. That was to best of my memory. Then he held my hands and died. Apart from what I have said Tungku Mansur did not tell me anything else and I did not tell him anything else. I can't remember anything else. I was with Tungku Mansur for about an hour in Intensive Care.
>
> I saw Tungku Mansur during my visit to Australia on 26.10.93 only once, ie on the morning he died.
>
> Tungku Mansur looked awfull (sic) when I met him there.

[115] In opposing the applications for leave, the plaintiffs pointed out that the defendants have failed to clearly identify those part(s) of PW2's evidence in the Alor Setar High Court that is/are purportedly in conflict with PW2's evidence in the case under appeal here and state how such purported contradiction in the evidence would have had or would have been likely to

have had a determining influence on the decision of the learned judge. Further:

(a) the purported fresh evidence that the defendants are attempting to adduce are indeed not 'fresh evidence' as contemplated under r 7(3A) of the Rules;

(b) such purported fresh evidence, would have been made available in the instant appeals if the defendants have acted with reasonable diligence; and

(c) such purported fresh evidence would not have had or would have been unlikely to have had a determining influence upon the decision of the learned judge.

[116] The plaintiffs further pointed out that when PW2 gave evidence in the instant appeals he was about 75 years old and that when he gave evidence in the Alor Setar High Court he was about 78 years old. In his evidence in the Alor Setar High Court, PW2 even said the following:

> I lost some memory since my brother's death on 25 March 2006. I was very close to him and I was shocked and my memory seems to have gone.

[117] We have perused the evidence of PW2 as highlighted in the notes of proceedings of the suit in the Alor Setar High Court and compared it with his evidence in the instant appeals and found there are no discrepancies that would have any bearing on the decision of the learned judge. No questions with regards to the said shares were put to PW2 in the Alor Setar High Court which is the subject-matter of these instant appeals. We are of the view that the defendants failed to exercise reasonable diligence to challenge PW2's evidence and credibility before the learned judge when he gave evidence in the instant appeals and cannot now claim that he has given a different story in the Alor Setar High Court when no such thing took place. PW2 has explained that his memory has deteriorated since 2006. Further, we do not think that a witness can be faulted if he says he cannot remember certain details. The discrepancy, if at all, was more in relation to the health condition of the deceased when he was in the intensive care unit of the hospital than in relation to contents of the conversation that they had. That, to our mind, cannot tantamount to fresh evidence but would denote that the defendants have failed to elucidate what they wanted to know when they were cross-examining PW2 in these instant appeals.

[118] It our unanimous view that the excerpts from the evidence of PW2 in the Alor Setar High Court as highlighted by the defendants would not have had any bearing on the decision of the learned judge in the instant appeals. The learned judge was satisfied that PW2 was a reliable witness.

Beside relying upon the evidence of PW2, he had also stated in his judgment that he arrived at his decision based on other contemporaneous evidence and assessment of the credibility of the other witnesses. In *Ladd v Marshall* [1954] 3 All ER 745, it was held that for the court to allow further evidence to be adduced in support of an appeal against a decision of fact the evidence must be such as is presumably to be believed, and, as the evidence sought to be adduced was not of that description, it would not be admitted. Lord Denning LJ said (at p 748):

> It is very rare that application is made to this court for a new trial on the ground that a witness has told a lie. The principles to be applied are the same as those always applied when fresh evidence is sought to be introduced. In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive: third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.

[119] We find no special grounds for us to grant leave and as such had on 17 June 2008 dismissed encll 42a and 38a with costs.

Appeals dismissed with costs.

Reported by K Nesan